

CORNELL UNIVERSITY LAW LIBRARY

FROM THE

**BENNO LOEWY LIBRARY**

RECEIVED BY CORNELL UNIVERSITY  
UNDER THE WILL OF

MR. BENNO LOEWY



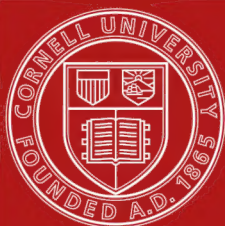
Cornell University Library  
KD 674.S67 1880

The principles of equity intended for t



3 1924 021 656 214

law



# Cornell University Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.





# THE PRINCIPLES OF EQUITY,

WITH AN

EPITOME OF THE EQUITY PRACTICE.

*Ballantyne Press*

BALLANTYNE, HANSON AND CO.  
EDINBURGH AND LONDON



THE  
PRINCIPLES OF EQUITY,

INTENDED FOR  
THE USE OF STUDENTS AND THE  
PROFESSION.

BY  
EDMUND H. T. SNELL,  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

*Fifth Edition.*

TO WHICH IS ADDED  
AN EPITOME OF THE EQUITY PRACTICE.

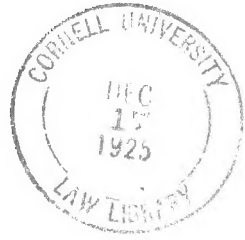
*Second Edition.*

BY  
ARCHIBALD BROWN,  
M.A. EDIN. & OXON., AND B.C.L. OXON.  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:  
STEVENS & HAYNES,  
Law Publishers,  
BELL YARD, TEMPLE BAR.  
1880.

B17497





TO

WILLIAM LLOYD BIRKBECK,

DOWNING PROFESSOR OF THE LAWS OF ENGLAND

IN THE UNIVERSITY OF CAMBRIDGE,

AND FORMERLY

READER IN EQUITY TO THE INNS OF COURT,

THIS FIFTH EDITION

OF

“ Snell’s Equity,”

TOGETHER WITH THIS SECOND EDITION

OF THE

“ Practice in Equity,”

CONTINUES TO BE

RESPECTFULLY INSCRIBED,—

BY THE EDITOR,

WHO (LIKE THE AUTHOR) WAS

FORMERLY HIS MUCH ADMIRING PUPIL.





## PREFACE TO THE FIRST EDITION.

---

THE Author, in the course of his studies for the Bar, made so many notes on the Principles of Equity and the cases in support of them, not only from his own private reading, but from the Lectures of that able and distinguished master, Mr. Birkbeck, the Lecturer on Equity Jurisprudence, that it required but little trouble to recast and mould them into the form of a book. Venturing to think that the work may prove useful not only to the student but the practitioner, he ventures with diffidence to submit the result of his labours to the consideration of the profession.



## PREFACE TO THE FOURTH EDITION.

---

THE Author of the "Principles of Equity" being dead, and the Editor of the Second and Third Editions having also died, and a new edition being wanted, I have, at the Publishers' request, edited the Fourth Edition.

To the "Principles of Equity" I have added the "Practice in Equity."

As regards the "Principles of Equity," being Book I. of the present edition, these have already proved themselves to be the very guide the student wants, and I have been careful not to alter same in their general character; but I have corrected a great many minor deficiencies and errors in them, and have excluded from them certain ill-founded (although vulgarly accepted) prejudices, and have generally worked up the language and the contents of the book to the level of the new procedure introduced by the Judicature Acts, 1873-77, and to the present state of the law. All the numerous references to Story, Spence, and

Smith have been allowed to stand ; but the quotations from these several authors have invariably been adapted, both in substance and in language, so as to give to the “Principles of Equity” a uniform and independent character of their own, and one (it is believed) of greater accuracy.

As regards the “Practice in Equity,” being Book II. of the present edition, that is an experiment, suggested by the necessities which I have experienced in my own practice. The experiment must be allowed to speak for itself ; its general character and its quality will be readily apparent upon inspection. Although the “Practice” is professedly confined to an action in the Chancery Division, it will be found to embrace (in fact) nearly the whole of the practice in the three Common Law Divisions also,—that being a consequence largely of the fusion of the different practices.

ARCHIBALD BROWN.

89 CHANCERY LANE, W.C.,

*May 1878.*



## PREFACE TO THE FIFTH EDITION.

---

IN this Fifth Edition, the “Principles of Equity” have been thoroughly revised, and the new decisions noted up. Some few statements that had crept into the Fourth Edition, and which were apparently erroneous, have been expressed more carefully in the present edition, and the student cannot now be misled thereby. Some paragraphs in the Fourth Edition have been shortened, and a few have been omitted, in order to make room for the new matter introduced into this Fifth Edition; but the size of the book is not materially enlarged.

The “Practice in Equity” has also been carefully revised, and the one or two errors therein have been corrected; and every new decision up to December 1879 inclusive in the Law Reports, and some few decisions in the other reports bearing upon the practice, together with the new orders and rules of November 1878 and of March 1879,

have been incorporated in their proper places. This practice has also been extended by means of additions (principally enclosed within square brackets), so as to be available for the Common Law practice as well,—but not for the Probate, Divorce, and Admiralty Division.

A. BROWN.

*December 1879.*

# CONTENTS.

---

## *BOOK I.—THE PRINCIPLES OF EQUITY.*

### PART I.

CHAP.	INTRODUCTORY.	PAGES
I.	THE JURISDICTION IN EQUITY, . . .	1-16
II.	THE MAXIMS OF EQUITY, . . .	17-48

---

### PART II.

#### THE EXCLUSIVE JURISDICTION.

I.	TRUSTS GENERALLY, . . . . .	49-59
II.	EXPRESS PRIVATE TRUSTS, . . . . .	60-117
III.	EXPRESS PUBLIC [OR CHARITABLE] TRUSTS, . . . . .	118-123
IV.	IMPLIED AND RESULTING TRUSTS, . . . . .	124-135
V.	CONSTRUCTIVE TRUSTS, . . . . .	136-145
VI.	TRUSTEES AND OTHERS IN A FIDUCIARY RELATION, . . . . .	146-169
VII.	DONATIONES MORTIS CAUSÂ . . . . .	170-176
VIII.	LEGACIES, . . . . .	177-181
IX.	CONVERSION, . . . . .	182-202
X.	RECONVERSION, . . . . .	203-212
XI.	ELECTION, . . . . .	213-231
XII.	PERFORMANCE, . . . . .	232-240

CHAP.	PAGES
XIII. SATISFACTION, . . . . .	241-259
XIV. ADMINISTRATION OF ASSETS, . . . . .	260-283
XV. MARSHALLING OF ASSETS, . . . . .	284-294
XVI. MORTGAGES, LEGAL, . . . . .	295-323
XVII. MORTGAGES, EQUITABLE, . . . . .	324-328
XVIII. MORTGAGES AND PLEDGES OF PERSONALTY, . . . . .	329-332
XIX. LIENS, . . . . .	333-336
XX. PENALTIES AND FORFEITURES, . . . . .	337-343
XXI. MARRIED WOMEN, . . . . .	344-401
SECTION I.—SEPARATE ESTATE, . . . . .	346-370
SECTION II.—PIN-MONEY AND PARAPHERNALIA, . . . . .	370-374
SECTION III.—EQUITY TO A SETTLEMENT AND RIGHT OF SURVIVORSHIP, . . . . .	374-398
SECTION IV.—SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS, . . . . .	399-401
XXII. INFANTS, . . . . .	402-411
XXIII. LUNATICS, IDIOTS, AND PERSONS OF UN- SOUND MIND, . . . . .	412-417

## PART III.

## THE CONCURRENT JURISDICTION.

I. ACCIDENT, . . . . .	420-431
II. MISTAKE, . . . . .	432-446
III. ACTUAL FRAUD, . . . . .	447-463
IV. CONSTRUCTIVE FRAUD, . . . . .	464-481
V. SURETYSHIP, . . . . .	482-494
VI. PARTNERSHIP, . . . . .	495-504

# CONTENTS.

xv

CHAP.	PAGES
VII. ACCOUNT, . . . . .	505-511
VIII. SET-OFF AND APPROPRIATION OF PAYMENTS, .	512-520
IX. SPECIFIC PERFORMANCE, . . . . .	521-550
X. INJUNCTION, . . . . .	551-584
XI. PARTITION, . . . . .	585-588
XII. INTERPLEADER, . . . . .	589-595

## PART IV.

### THE AUXILIARY JURISDICTION.

I. DISCOVERY, . . . . .	596-602
II. BILLS TO PERPETUATE TESTIMONY, . . . . .	603-606
III. BILLS "QUIA TIMET" AND BILLS OF PEACE, .	607-610
IV. CANCELLING AND DELIVERY UP OF DOCUMENTS,	611-616
V. BILLS TO ESTABLISH WILLS, . . . . .	617-622
VI. "NE EXEAT REGNO," . . . . .	623-624



## *BOOK II.—THE PRACTICE IN EQUITY.*

SECT.	PAGES
1-4. THE COURTS (SUPERIOR AND INFERIOR, ORIGINAL AND APPELLATE), AND THE JURISDICTION THEREOF, . . .	625-630
5. THE FORMAL PROCEDURE AND THE SUM- MARY PROCEDURE DISTINGUISHED, . . .	630-631
6-16. THE WRIT OF SUMMONS.—THE FORMAL AND THE SUMMARY PROCEDURE, . . .	631-640
17-27. THE APPEARANCE OF DEFENDANT.—THE FORMAL AND THE SUMMARY PROCEDURE, . . .	640-649
28-39. THE PARTIES.—THE FORMAL AND THE SUMMARY PROCEDURE, . . .	649-658
40-59. THE PLEADINGS.—THE FORMAL AND THE SUMMARY PROCEDURE, . . .	658-674
60-66. THE EVIDENCE.—THE FORMAL AND THE SUMMARY PROCEDURE, . . .	674-683
67-74. THE TRIAL.—THE FORMAL AND THE SUM- MARY PROCEDURE, . . .	684-694
75-88. THE JUDGMENT.—THE FORMAL AND THE SUMMARY PROCEDURE, . . .	694-706 <i>b</i>

SECT.	PAGE
89-109. THE EXECUTION.—THE FORMAL AND THE SUMMARY PROCEDURE, . . .	706-724
110-117. CHAMBERS AND DISTRICT REGISTRIES.— PROCEEDINGS IN, . . .	724-733
118-126. MOTIONS AND SUMMONSES.—PROCEED- INGS BY, . . .	733-743
127-129. COSTS.—PROVISIONS REGARDING, GENERAL AND PARTICULAR, . . .	743-750
130-135. APPEALS.—THE FORMAL AND THE SUM- MARY PROCEDURE, . . .	750-760
136-137. TIME.—PROVISIONS REGARDING, GENERAL AND PARTICULAR, . . .	760-771
138. TABULAR VIEW OF THE SUCCESSIVE STEPS IN AN ACTION, . . .	772-773
<hr/>	
I. INDEX TO THE PRINCIPLES OF EQUITY, . . .	775
II. INDEX TO THE PRACTICE, . . .	837



# REPORTS AND TEXT WRITERS,

WITH

## ABBREVIATIONS.



Ad. & Ell.	Adolphus and Ellis.
Amb.	Ambler.
Anst.	Anstruther.
Atk.	Atkyns.
Ball & B.	Ball and Beatty (Irish).
B. & A.	Barnewall and Alderson.
B. & Ad.	Barnewall and Adolphus.
Barn & Cress.	Barnewall and Creswell.
Beav.	Beavan.
B. & S.	Best and Smith.
Bing. N. C.	Bingham, New Cases.
Bl. Com.	Blackstone's Commentaries.
B. & P.	Bosanquet and Puller.
Brod. & Bing.	Broderip and Bingham.
Bro. C. C.	Brown's Chancery Cases.
Bro. Law Dict.	Brown's Law Dictionary and Institute.
Bro. P. C.	Brown's Parliamentary Cases.
Ca. t. Talb.	Cases <i>tempore</i> Talbot.
Cha. Ca.	Cases in Chancery.
Co. Lit.	Coke upon Littleton.
Coop.	Cooper (G), Chancery Cases.
Coote.	Coote on Mortgages.
Cowp.	Cowper.
Cr. & Ph.	Craig and Phillips.
Cro. Eliz.	Croke's Reports, vol. i.
Dan. Ch. Pr.	Daniell's Chancery Practice, 5th ed.
Dart's V. & P.	Dart's Vendors and Purchasers, 4th ed.
De G. F. & Jo.	De Gex, Fisher, and Jones.
De G. & J.	De Gex and Jones.
De G. J. & S.	De Gex, Jones, and Smith.
De G. M. & G.	De Gex, Macnaghten, and Gordon.
Dixon on Partn.	Dixon on Partnership.
Doug.	Douglas.
Drew.	Drewry.

# XX    REPORTS AND TEXT WRITERS, WITH ABBREVIATIONS.

Dr. & Walsh.	Drury and Walsh.
Dr. & War.	Drury and Warren.
Eden.	Eden's Chancery Cases.
Ell. Bl. & Ell.	Ellis, Blackburn, and Ellis.
Ell. & Black.	Ellis and Blackburn.
E. & A.	Error and Appeal (Upper Canadian).
Exch. Rep.	Exchequer Reports.
Fonbl.	Fonblanque on Equity.
Fry on Spec. Perf.	Fry on Specific Performance.
Giff.	Giffard.
Gilb. Us.	Gilbert on Uses.
Gr.	Grant (Upper Canadian).
Ha.	Hare.
Hayes' Intro.	Hayes' Introduction to Conveyancing.
H. & Tw.	Hall and Twells.
H. & M.	Hemming and Miller.
Holt, N. P.	Holt, Nisi Prius Cases.
H. L. Cas.	House of Lords' Cases.
John.	Johnson.
J. & H.	Johnson and Hemming.
J. & L.	Jones and Latouche (Irish).
Jac.	Jacob.
J. & W.	Jacob and Walker.
Jur. N. S.	Jurist, New Series.
K. & J.	Kay and Johnson.
Kay.	Kay.
Kee.	Keen.
L. J., N. S.	Law Journal, New Series.
L. R., Ch. App.	Law Reports, Chancery Appeal Cases.
L. R., Eq.	Law Reports, Equity Cases.
L. R., H. L.	Law Reports, House of Lords' Cases.
L. R., P. C.	Law Reports, Privy Council Cases.
L. R., Ch. D.	Law Reports, Chancery Division (comprising Equity Cases and Chancery Appeal Cases since November 1875).
L. R., App. Ca.	Law Reports, Appellate Cases (comprising House of Lords and Privy Council Cases since November 1875).
L. R., Exch. Div.	} Law Reports, the respective Common Law Divisions, commencing November 1875.
L. R., C. P. Div.	
L. R., Q. B. Div.	
Lew. on Tr.	Lewin on Trusts.
L. C.	White and Tudor's Leading Cases in Equity, 5th ed.
Lind. Part.	Lindley on Partnership, 3d ed.
L. T. N. S.	Law Times Reports, New Series.
M. & G.	Macnaghten and Gordon.
Mad. & G.	Maddock and Geldart.
Madd.	Maddock.
Mayne on Dam.	Mayne on Damages.
Mod.	Modern Reports.
Moll.	Molloy (Irish).
Mont. D. & D.	Montague, Deacon, and De Gex.

Moore P. C. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig.
My & K.	Mylne and Keen.
Nev. & Man.	Neville and Manning.
Peach. Mar. Settl.	Peachey on Marriage Settlements.
P. Wms.	Peere Williams.
Ph.	Phillips.
Prec. Ch.	Precedents in Chancery.
Rep.	Lord Coke's Reports.
Rob.	Robertson's Ecclesiastical Reports.
Roper, Husb. & Wife.	Roper's Husband and Wife.
Russ.	Russell.
Russ. & My.	Russell and Mylne.
Sand. Us.	Sanders on Uses.
Sch. & Lef.	Schoales and Lefroy (Irish). <sup>1</sup>
Sel. C. C.	Select Chancery Cases.
Show.	Shower.
Sim.	Simons.
Sm. & Giff.	Smale and Giffard.
Sm. Man.	Smith's Manual of Equity, 11th ed.
Sp.	Spence's Equity.
St.	Story's Equity Jurisprudence.
Sugd. V. & P.	Sugden's Vendors and Purchasers, 14th ed.
Sw. & Tr.	Swabey and Tristram.
Swanst.	Swanston.
T. R.	Term Reports.
T. & R.	Turner and Russell.
Vern.	Vernon.
Ves. & B.	Vesey and Beames.
Ves. Sr.	Vesey, Senior.
Ves. Jr.	Vesey, Junior.
W. R.	Weekly Reporter.
Wms. on Assets.	Williams on Real Assets.
Wms. on Exors.	Williams on Executors, 6th ed.
Wilm.	Wilmot's Notes and Opinions, K. B.
Y. & C. Exch. Ca.	Younge and Collyer's Exchequer Cases.
Yo. & Co. C. C.	Younge and Collyer's Chancery Cases.
Y. & J.	Younge and Jervis.



# INDEX TO CASES CITED

IN

“THE PRINCIPLES” AND IN “THE PRACTICE.”

- 
- |                                 |                                    |
|---------------------------------|------------------------------------|
| ABBOT, <i>Ex parte</i> , 349    | Ambrose v. Evelyn, 659             |
| ——— v. Swarder, 455, 457        | Amos v. Chadwick, 647              |
| Abernethy v. Hutchinson, 576    | Amphlett v. Parke, 200             |
| Abrahall v. Bubb, 568           | Anderson v. Anderson, 499          |
| Abud v. Riches, 749             | ——— v. Elsworth, 480               |
| Ackroyd v. Smithson, 193-195,   | ——— v. Morrison, 744               |
| 197, 198                        | ——— v. Radcliffe, 103              |
| Acton v. White, 365             | Andrews v. Salt, 403               |
| ——— v. Woodgate, 92, 93         | Angell v. Angell, 597, 603, 605    |
| Adair v. Young, 745, 760        | Anglo-Italian Bank v. Davies, 301, |
| Adamson, <i>Ex parte</i> , 503  | 739                                |
| Adams v. Angell, 312            | <i>Anon.</i> (Cro. Eliz., 68), 517 |
| Adderly v. Dixon, 524-526, 530  | ——— (Com. Rep., 43), 100           |
| Adlington v. Cann, 110          | ——— (3 Atk., 313), 303             |
| Adney v. Field, 427             | ——— (1 Vern., 45), 308             |
| Agar-Ellis, <i>In re</i> , 403  | ——— (2 K. & J., 441), 500          |
| Ainslie v. Medlicott, 439       | ——— (18 Vesey, 258), 266           |
| Aitcheson v. Dixon, 390         | Antrobus v. Davidson, 486          |
| Albert (Prince) v. Strange, 578 | ——— v. Smith, 71                   |
| Albion Steel Company, 270       | Appleford v. Judkins, 630, 751     |
| Alderson v. White, 297          | Appleton v. Rowley, 351            |
| Aldrich v. Cooper, 284, 285     | Arbuthnot v. Norton, 101           |
| Aldridge v. Wallscourt, 273     | Armitage, <i>In re</i> , 492       |
| Aleyn v. Belchier, 480          | Arnot v. Biscoe, 454               |
| Allan v. Knight, 40, 315        | Arrowsmith, <i>Ex parte</i> , 295  |
| Allen, <i>In re</i> , 745       | Arundell v. Phillpot, 426          |
| Allen v. M'Pherson, 444, 620,   | Ashburner v. Macguire, 179         |
| 621                             | Ashburnham v. Ashburnham, 229      |
| Allen v. Seckham, 39            | Ashby v. Palmer, 191, 206          |
| Allhusen v. Labouchere, 675     | Ashley v. Ashley, 264              |
| Allison's Case, 452             | Ashley v. Taylor, 638              |
| Alvanley v. Kinnaird, 541       | Ashton v. Blackshaw, 89            |

- Ashworth v. Outram, 347, 744,  
     759  
 Associated Home Company v.  
     Whichcord, 655  
 Astley v. Weldon, 339, 341  
 Aston v. Aston, 371  
 Atcheson v. Atcheson, 396  
 Athenæum Life Association v.  
     Pooley, 100  
 Atkinson v. Leonard, 421  
     — v. Smith, 323  
 Atkyns v. Kinnier, 340  
 Attenborough v. St. Catherine  
     Docks Company, 590  
 Att.-Gen. v. Alford, 167  
     — v. Biphosphated Guano  
         Company, 36  
     — v. Borough of Birming-  
         ham, 571  
     — v. Caius College, 121  
     — v. Christ's Hospital, 123  
     — v. Cleaver, 569  
     — v. Downing, 147  
     — v. Duke of Marlborough,  
         568  
     — v. Gleg, 147  
     — v. Herrick, 121  
     — v. Marchant, 121  
     — v. Mayor of Bristol, 122  
     — v. Lord Mountmorris, 294  
     — v. Nichol, 570, 571  
     — v. Ray, 449, 452  
     — v. Read, 409  
     — v. Sibthorp, 427  
     — v. Sitwell, 475, 530  
     — v. Southmolton, 122  
     — v. Swansea Tramways  
         Company, 723  
     — v. The Ironmongers' Com-  
         pany, 120  
     — v. Tomline, 702  
     — v. Tonna, 121  
     — v. Trinity College, Cam-  
         bridge, 122  
 Att.-Gen. of Jamaica v. Mander-  
     son, 518  
 Atwood v. Chichester, 359  
 Atwood v. Maude, 504  
 Aubrey v. Browne, 396  
 Austen v. N. & S. Woolwich Sub-  
     way Company, 675  
 Austin, *In re*, 103  
 Averall v. Wade, 287  
 Ayerst v. Jenkins, 614  
 Ayles v. Cox, 545  
 Aylesford v. Morris, 476  
 Aylesford's Case, 533  
 Aylet v. Dodd, 339  
 Aylett v. Ashton, 359  
 Ayliffe v. Murray, 152  
 Aynsley v. Glover, 571  
 BABY v. Miller, 246  
 Backhouse v. Charlton, 325, 497  
 Bacon v. Jones, 574  
 Baddeley v. Baddeley, 74, 347  
 Baggett v. Meux, 364  
 Bagnall v. Carlton, 153  
 Bagot v. Bagot, 275  
 Bagot v. Easton, 653, 656, 660  
 Bailey v. Edwards, 491, 492  
     — v. Finch, 516  
     — v. Sweeting, 86, 536  
 Bain v. Sadler, 262  
 Baker v. Bradley, 364, 469  
     — v. Gray, 318  
 Baldwin v. Baldwin, 394  
 Bales v. Dandy, 345  
 Ball v. Coutts, 409  
     — v. Montgomery, 395  
     — v. Storie, 540  
 Balls v. Strutt, 148  
 Balmano v. Lumley, 547  
 Bamford v. Creasy, 342  
 Banks v. Goodfellow, 619  
 Bannister, *In re*, 549  
 Barber, *In re*, 390, 391  
 Bardswell v. Bardswell, 105  
 Baring v. Noble, 503  
 Barker v. Cox, 547  
     — v. Goodaire, 498  
     — v. Hill, 427  
 Barker's Estate, *In re*, 698  
 Barkworth v. Young, 535, 536  
 Barnard v. Ford, 395  
 Barnes v. Racster, 287  
 Barnett v. Sheffield, 100  
 Barnewell v. Lord Cawdor, 280  
 Barnhart v. Greenshields, 37, 398  
 Barnwell v. Iremonger, 276  
 Baron v. Husband, 95  
 Barrack v. M'Culloch, 352, 363

- Barrel *v.* Sabine, 298  
 Barret *v.* Blagrave, 562  
     — *v.* Beckford, 244  
 Barrett *v.* Hammond, 715  
 Barrington *v.* Tristram, 181  
 Barrow *v.* Barrow, 229, 396, 409,  
     437  
 Barrs *v.* Fewkes, 200  
 Barry *v.* Croskey, 449  
 Bartholomew's Estate, *In re*,  
     367  
 Bartlett *v.* Gillard, 245  
     — *v.* Pickersgill, 125  
 Baskcomb *v.* Beckwith, 539  
 Basset *v.* Nosworthy, 30  
 Bastard *v.* Proby, 67  
 Batard *v.* Hawes, 489  
 Batchelor *v.* Middleton, 304  
 Bate *v.* Hooper, 163  
 Bateman *v.* Willoe, 559  
 Bates *v.* Dandy, 340  
     — *v.* Eley, 119  
     — *v.* Johnson, 164, 310  
 Bath, Earl of, *v.* Sherwin, 609  
 Battie's Case, 467  
 Baud *v.* Fardell, 162  
 Baum, *In re*, 746  
 Baumann *v.* James, 523  
 Baxendale *v.* M'Murray, 572  
     — *v.* Seale, 541  
 Baxter *v.* Conolly, 523  
     — *v.* West, 500, 501  
 Bayspoole *v.* Collins, 86  
 Beale *v.* Symonds, 131  
 Beall *v.* Smith, 412, 415  
 Beauclerk *v.* Mead, 184  
 Beavan *v.* Lord Oxford, 84, 314  
 Beck *v.* Kantorowicz, 474  
 Beckervaise *v.* Lewis, 100  
 Beckett *v.* Buckley, 301  
 Beckford *v.* Beckford, 126  
     — *v.* Wade, 22, 303  
 Beckingham *v.* Owen, 663  
 Beddoes *v.* Beddoes, 734, 738  
 Beeston *v.* Stutley, 547  
 Beevor *v.* Luck, 302, 318, 494  
 Belchier, *Ex parte*, 149  
 Belfour *v.* Weston, 430  
 Bell *v.* Barnett, 142  
     — *v.* North Staffordshire  
     Railway Company, 771  
 Belmont *v.* Ayward, 746  
 Benbow *v.* Townsend, 58  
 Bennet *v.* Cooper, 95  
     — *v.* Lytton, 114  
 Bennett *v.* Bennett, 128  
     — *v.* Houldsworth, 255  
 Benson *v.* Benson, 204  
     — *v.* Lamb, 549  
     — *v.* Whittam, 107  
 Bentley *v.* Craven, 474  
     — *v.* Mackay, 436  
 Benwell *v.* Inns, 466  
 Benyon *v.* Benyon, 246  
 Berdan *v.* Birmingham Small  
     Arms, 753  
 Berdon *v.* Greenwood, 666  
 Beresford *v.* Driver, 528  
     — *v.* Hobson, 378  
 Bernard *v.* Minshull, 105, 109  
 Berwick, Mayor of, *v.* Murray,  
     168, 489  
 Besant, *In re*, 405  
 Besley *v.* Besley, 546  
 Best *v.* Hill, 514  
 Bethell *v.* Abraham, 253  
 Betts *v.* Kimpton, 344, 390  
 Beverley *v.* Att.-Gen., 121, 122  
 Biedermann *v.* Seymour, 280  
 Biggs *v.* Terry, 406  
 Bigland *v.* Huddleston, 229  
 Bigsby *v.* Dickinson, 744, 759  
 Bill *v.* Cureton, 75, 84, 612  
 Bindley *v.* Partridge, 151  
 Birch *v.* Ellames, 40  
 Birkett, *In re*, 120  
 Birmingham Canal Company *v.*  
     Cartwright, 297  
 Birmingham *v.* Kirwan, 225  
 Biron *v.* Mount, 93  
 Biscoe *v.* Earl of Banbury, 39  
 Bishop, *Ex parte*, 90  
 Blackburn *v.* Stables, 63  
 Blackburn Union *v.* Brooks, 682  
 Blackman *v.* Edwards, 748  
 Black & Co.'s Case, 515  
 Blacket *v.* Lamb, 219, 221  
 Blagden *v.* Bradbear, 531  
 Blagrave *v.* Routh, 169  
 Blake *v.* Appleyard, 745  
 Blaiklock *v.* Grindle, 223  
 Blain *v.* Terryberry, 354

- Blakeley Ordinance Company, *In re*, 100  
 Blakely *v.* Brady, 74  
 Blanchet *v.* Foster, 400  
 Blandy *v.* Widmore, 237, 238, 240, 244  
 Blann *v.* Bell, 293  
 Bligh, *In re*, 412  
 Blinkhorn *v.* Feast, 132  
 Blissit *v.* Daniel, 498  
 Blundell *v.* Brettargh, 430  
 Blunden *v.* Desart, 335  
 Boddy *v.* Wall, 671  
 Bold *v.* Hutchinson, 442, 536  
 Bolton *v.* Williams, 592  
 ——— *v.* London School Board, 738  
 Bond *v.* England, 275  
 ——— *v.* Hopkins, 4, 530  
 ——— *In re*, 105  
 Bone *v.* Pollard, 129  
 Bonham, *In re*, 271  
 Bonham *v.* Newcombe, 297  
 Bonner *v.* Bonner, 292, 395  
 Bonnewell *v.* Jenkins, 550  
 Bonser *v.* Cox, 470  
 Booth *v.* Booth, 156  
 ——— *v.* Hutchinson, 515  
 ——— *In re*, 262  
 Bootle *v.* Blundell, 268, 618  
 Bosanquet *v.* Wray, 504  
 Bostock *v.* Floyer, 149  
 Boughton *v.* Boughton, 222, 224  
 Boulton *v.* Stubbs, 491  
 Bourne *v.* Bourne, 183, 187  
 Boutts *v.* Ellis, 175  
 Bovill *v.* Hammond, 504  
 Bowey *v.* Bell, 749  
 Bowker *v.* Bull, 494  
 Bowser *v.* Colby, 342  
 Box *v.* Barret, 445  
 Boyd *v.* Nunn, 659  
 Boynton *v.* Boynton, 230, 657  
 ——— *v.* Parkhurst, 289  
 Boyse *v.* Rossborough, 461, 618, 621  
 Bozon *v.* Bolland, 334  
 Brace *v.* Duchess of Marlborough, 312  
 Bradford *v.* Rothney, 443  
 Bradish *v.* Gee, 208  
 Bradley *v.* Riches, 36, 42, 302, 494  
 Bradshaw *v.* Bradshaw, 410  
 Braham *v.* Brachim, 584  
 Brandon *v.* Robinson, 346, 360  
 Brandreth's Trade Mark, *In re*, 743  
 Breadalbane *v.* Chandos, 442  
 Brecknock Canal Company *v.* Pritchard, 430  
 Brennan *v.* Bolton, 533  
 Brentwood Brick & Coal Company, *In re*, 139  
 Brewer *v.* Swirles, 351  
 Brice *v.* Bannister, 101  
 Brice *v.* Stokes, 157, 158, 168  
 Bridge *v.* Bridge, 77  
 Bridgeman *v.* Green, 452  
 Briggs *v.* Chamberlain, 208, 385  
 ——— *v.* Jones, 317  
 ——— *v.* Penny, 107  
 Bright *v.* Marner, 654  
 Brighton Arcade Company *v.* Dowling, 515  
 Bristowe *v.* Warde, 217  
 British Dynamite Company *v.* Krebs, 626, 758  
 British Empire Shipping Co. *v.* Sones, 421, 497, 600  
 British Mutual Investment Company *v.* Smart, 314  
 Broadbent *v.* Imperial Gas Company, 570  
 Broad *v.* Selve, 297  
 Brocksopp *v.* Barnes, 151  
 Broden *v.* Saillard, 562  
 Bromley *v.* Holland, 615  
 Brooke *v.* Garrod, 298  
 ——— *In re*, 268, 335  
 ——— *v.* Brooke, 268  
 ——— *v.* Rounthwaite, 547, 549  
 ——— *v.* Wigg, 685  
 Broughton *v.* Broughton, 151  
 ——— *v.* Hutt, 434  
 Brown *v.* Cole, 302  
 ——— *v.* De Tastet, 155  
 ——— *v.* Higgs, 111, 428  
 ——— *v.* Litton, 155  
 ——— *Re*, 518  
 ——— *v.* Smith, 411  
 Bruce *v.* Bruce, 427



- Bruere v. Pemberton, 266  
 Bryant v. Bull, 301  
 ——— v. Hubert, 748  
 Brydges v. Phillips, 273  
 Bryson v. Whitehead, 466  
 Buchanan v. Kerby, 518  
 Buckland v. Pocknell, 137  
 Buckle v. Mitchell, 30, 37  
 Buckton v. Hay, 361  
 ——— v. Higgs, 665  
 Buckworth v. Buckworth, 410  
 Buggin v. Yates, 105  
 Bull v. Vardy, 426  
 Buller v. Plunket, 99  
 Bulley v. Bulley, 335  
 Bullock v. Dommitt, 430  
 Bullpin v. Clarke, 357  
 Bulmer v. Hunter, 87  
 Bunn v. Markham, 170  
 Burdick v. Garrick, 507  
 Burdon v. Dean, 378  
 Burgess v. Burgess, 578  
 ——— v. Wheate, 131  
 Burgoine v. Taylor, 697  
 Burke v. Greene, 102  
 Burles v. Popplewell, 557  
 Burn v. Carvalho, 96  
 Burnell v. Burnell, 588  
 Burrell v. Baskerfield, 184  
 Burrough v. Philcox, 111  
 Burrows v. Walls, 168  
 Burton v. Sturgeon, 393  
 Butcher v. Kemp, 225  
 Bute (Marquis) v. Thompson, 430  
 Butler v. Butler, 166  
 ——— v. Freeman, 404  
 Butlin's Trusts, *In re*, 367  
 Buttanshaw v. Martin, 363  
 Butterfield v. Heath, 86  
 Buttrick v. Brodhurst, 230  
 Buxton v. Lister, 495, 526  
  
 CADOGAN v. Kennet, 398  
 Cahen, *Ex parte*, 627  
 ——— *In re*, 627  
 Callaghan v. Callaghan, 758  
 Calvert, *Ex parte*, 334  
 ——— v. London Dock Co., 490  
 Campbell v. Earl of Dalhousie,  
 605  
 ——— v. French, 445  
  
 Campbell v. Holyland, 322  
 ——— v. Mullett, 503  
 ——— v. Scott, 575  
 ——— v. Walker, 473  
 ——— James, *Re*, 558  
 Campion v. Cotton, 373  
 Capel v. Butler, 473  
 Capon's Trusts, *In re*, 481  
 Cargill v. Bower, 660  
 Carr v. Eastabrooke, 395  
 ——— v. Ellison, 205  
 ——— *Ex parte*, 302  
 Carr's Trusts, *Re*, 381  
 Carron Iron Co. v. Maclaren, 555  
 Carter v. Carter, 28, 164, 310  
 ——— v. Palmer, 474  
 ——— v. Saunders, 269  
 ——— v. Taggart, 396  
 ——— v. Wake, 330  
 Cartwright v. Pulteney, 586  
 Carver v. Pinto Leite, 602  
 ——— v. Richards, 480  
 Casborne v. Scarfe, 300  
 Cash v. Parker, 739  
 Cassiopeia, *The*, 638  
 Castle v. Warland, 150  
 Caton v. Caton, 531, 534, 537  
 ——— v. Rideout, 353  
 Cator v. Pembroke, 140  
 Catt v. Tourle, 561  
 Cawdor v. Lewis, 478, 516  
 Cecil v. Juxon, 347  
 Challis v. Casborn, 316  
 Chaloner v. Butcher, 208  
 Chambers v. Goldwin, 297  
 Champion v. Formby, 669  
 Champney v. Davey, 123  
 Chancey's Case, 24  
 Chapman v. Emery, 84  
 Chapman v. Real Property Trust,  
 Limited, 761  
 Charter v. Trevelyan, 474  
 Chatterton v. Cave, 576  
 Chattock v. Muller, 550  
 Chauntler's Claim, 316  
 Cheavin v. Walker, 580  
 Cheetham v. Ward, 492  
 Chennill, *In re*, 745  
 Chesterfield v. Jansen, 448  
 Chichester v. Bickerstaff, 210  
 ——— v. Coventry, 255

- Child *v.* Elsworth, 180  
 ——— *v.* Stenning, 560, 746  
 ——— *v.* Stephens, 269  
 Childers *v.* Childers, 126  
 Chilton *v.* Corporation of London, 679, 698  
 Cholmondeley *v.* Clinton, 305  
 Chorley, *Ex parte*, 100  
 Christie *v.* Christie, 579  
 Christie *v.* Courtenay, 265  
 Churchill *v.* Small, 373  
 City of Glasgow Bank Cases, 467  
 City of London Brewery Company *v.* Tennant, 531  
 City of London *v.* Levy, 597  
 Clark *v.* Sewell, 180  
 ——— *v.* Taylor, 120  
 ——— *v.* Wright, 90  
 Clarke *v.* Byne, 593  
 ——— *v.* Cort, 514  
 ——— *v.* Franklin, 185, 192, 201, 202  
 ——— *v.* Girdwood, 470  
 ——— *v.* Henty, 489  
 ——— *v.* Parker, 459  
 ——— *v.* Royle, 137  
 ——— *v.* Roche, 629, 746  
 Clarkson *v.* Kitson, 460  
 Clayton's Case, 517, 519, 520  
 Clayton *v.* Earl of Winton, 90  
 Clegg *v.* Fishwick, 142  
 Cleland, *Ex parte*, 335  
 Clements *v.* Hall, 501  
 Clementson *v.* Gandy, 228  
 Clermont *v.* Tasburgh, 546  
 Clifford *v.* Burlington, 427  
 Clifton *v.* Burt, 281, 282  
 ——— *v.* Cockburn, 436  
 Clinan *v.* Cooke, 534, 539  
 Clive *v.* Carew, 352  
 Clough *v.* Bond, 149, 150, 161, 429  
 Clow *v.* Harper, 686  
 Coal Consumers' Co, *In re*, 270  
 Cochrane *v.* Willis, 435, 438  
 ———, *Ex parte* 754  
 Cockell *v.* Taylor, 102  
 Cockle *v.* Joyce, 698  
 Cocks *v.* Chandler, 577  
 ——— *v.* Manners, 119  
 Cogan *v.* Duffield, 397  
 Cogan *v.* Stephens, 197  
 Cogent *v.* Gibson, 527  
 Cole *v.* Gibson, 465  
 ——— *v.* Hawes, 105  
 ——— *v.* Willard, 243, 257  
 Colebourne *v.* Colebourne, 634  
 Coleman *v.* Mellersh, 169  
 Coles *v.* Trecothick, 54, 473  
 College of Christ *v.* Martin, 761  
 Collett *v.* Dickenson, 358  
 Collette *v.* Goode, 659  
 Collie, *In re*, 503  
 Collingwood *v.* Rowe, 189  
 Collins *v.* Archer, 33  
 ——— *v.* Collins, 137  
 ——— *v.* Lewis, 282  
 Collis *v.* Robins, 273, 281  
 Colombine *v.* Penhall, 87  
 Coming, *Ex parte*, 324  
 Constable *v.* Bull, 106  
 Cook *v.* Dawson, 268  
 ——— *v.* Gregson, 260, 265  
 ——— *v.* Rosslyn, 593  
 Cooke *v.* Chilcott, 561  
 ——— *v.* Dealey, 195  
 ——— *Ex parte*, 511  
 ——— *v.* Lamotte, 480  
 ——— *v.* Wilton, 315  
 Cookson *v.* Cookson, 205, 210, 297  
 Coombe, *Ex parte*, 326  
 Coope *v.* Twynam, 488, 490  
 Cooper *v.* Cooper, 229, 252, 724  
 ——— *v.* Joel, 611  
 ——— *v.* London, Brighton, & South Coast Ry. Co., 341  
 ——— *v.* M'Donald, 351, 363  
 ——— *v.* Phipps, 432, 434  
 ——— *Ex parte*, 746  
 Coote *v.* Boyd, 247  
 ——— *v.* Lowndes, 278  
 Cooth *v.* Jackson, 531  
 Cope *v.* Evans, 579  
 Copis *v.* Middleton, 487  
 Coppin *v.* Ferneyhough, 144  
 Corder *v.* Morgan, 320  
 Cornthwaite *v.* Frith, 94  
 Coutts *v.* Acworth, 480, 612  
 Coventry *v.* Chichester, 248  
 Cowell *v.* Edwards, 489  
 Coxhead *v.* Millis, 462

- Cox's Case, 468  
 Crabtree *v.* Bramble, 209  
 Cracknall *v.* Janson, 84, 312,  
     318, 749  
 Cradock *v.* Piper, 285  
 Craig *v.* Phillips, 735  
 Cranmer's Case, 242  
 Crawford *v.* Shuttock, 579  
 Crawshay *v.* Collins, 498, 501  
 ——— *v.* Maule, 495, 497  
 ——— *v.* Thornton, 589, 590  
 Craythorne *v.* Swinburne, 487,  
     489, 490  
 Credit Company, *In re*, 678  
 Credland *v.* Potter, 315, 317  
 Cremetti *v.* Crom, 707, 721  
 Creuze *v.* Hunter, 405  
 Cresswell *v.* Parker, 637  
 Croft *v.* Goldsmid, 342  
 ——— *v.* Lindsey, 556  
 Crompton's Trusts, *In re*, 364  
 Crosse *v.* Smith, 556  
 Crossley *v.* City of Glasgow Life  
     Assurance Company, 511  
 Crossley *v.* Lightowler, 572  
 Crouch *v.* Credit Foncier of Eng-  
     land, 100  
 Crowe *v.* Barnicott, 666  
 ——— *v.* Clay, 425  
 Crowle *v.* Russell, 557, 734, 740  
 Croxton *v.* May, 397  
 Crumlin Works, *In re*, 270  
 Cruse *v.* Barley, 200  
 Cullen *v.* Att.-Gen., 110  
 Curling *v.* May, 183  
 Currant *v.* Jago, 127  
 Currie, *In re*, 412  
 Currie *v.* Pye, 247, 293  
 Curry *v.* Pile, 246  
 Curteis *v.* Wormald, 199  
 Curtis *v.* Rippon, 106  
  
 DA COSTA *v.* Scandret, 455  
 Dacre *v.* Patrickson, 274  
 Daking *v.* Whimper, 84  
 Dale *v.* Sollett, 512  
 Dally *v.* Wonham, 474  
 Dalston *v.* Coatsworth, 424  
 Damer *v.* Lord Portarlington,  
     309  
 Daniels *v.* Davidson, 161  
  
 Dann *v.* Spurrier, 565  
 Darby *v.* Darby, 502  
 Darbey *v.* Whittaker, 523  
 Dardier *v.* Chapman, 390, 391  
 Darke *v.* Martyn, 150  
 Darkin *v.* Darkin, 353  
 Darston *v.* Lord Orford, 264  
 Dashwood *v.* Bulkeley, 459  
 Daubeny *v.* Cockburn, 480  
 David *v.* Dalton, 705  
 Davidson, *In re*, 210  
 Davies *v.* Ashford, 209  
 ——— *v.* Bush, 274  
 ——— *v.* Chatwood, 745  
 ——— *v.* Davies, 445, 469  
 ——— *v.* Felix, 733, 737  
 ——— *v.* Goodhew, 184  
 ——— *v.* Hodgson, 352  
 ——— *v.* Jenkins, 358  
 ——— *v.* London and Provincial  
     Marine Insurance, 482  
 ——— *v.* Penton, 340, 341  
 ——— *v.* Stainbank, 491  
 ——— *v.* Topp, 279  
 ——— *v.* Wattier, 420  
 Davis *v.* Dendy, 306  
 ——— *v.* Duke of Marlborough,  
     614  
 ——— *v.* Flagstaff Silver Mining  
     Company, 629  
 ——— *v.* Godbehere, 628, 630  
 ——— *v.* Kennedy, 579  
 ——— *v.* Page, 229  
 ——— *v.* Symonds, 440  
 Davy *v.* Garrett, 659  
 Dawkins *v.* Lord Penrhyn, 105,  
     661  
 Dawson *v.* Bank of Whitehaven,  
     323, 494  
 ——— *v.* Clarke, 159  
 ——— *v.* Dawson, 509  
 Day *v.* Brownrigg, 553, 734, 738  
 Deacon *v.* Colquhoun, 126  
 ——— *v.* Smith, 236  
 Dean *v.* M'Dowell, 501  
 Dearle *v.* Hall, 99  
 Debenham *v.* Ox, 466  
 De Bussche *v.* Alt, 474  
 De Cordova *v.* De Cordova, 436  
 Deeks *v.* Strutt, 177  
 Deerhurst *v.* St. Albans, 63

- De la Garde *v.* Lempriere, 391,  
     393, 394  
 Delmar *v.* Freemantle, 735  
 Demainbray *v.* Metcalfe, 331  
 De Manneville *v.* De Manneville,  
     403  
 Dennis *v.* Seymour, 663  
 Dent *v.* Bennet, 470  
     — *v.* Dent, 143  
 Denton *v.* Donner, 473  
 De Pass's Case, 467  
 De Pothonier *v.* De Mattos, 96  
 Dering *v.* Winchelsea, 488  
 De Tastet *v.* Shaw, 504  
 Devaynes *v.* Noble, 440  
 Devese *v.* Pontet, 244  
 De Visme, *In re*, 128  
 Devoy *v.* Devoy, 128  
 Dicker *v.* Angerstein, 320  
 Dickinson *v.* Burrell, 102  
 Dickson *v.* Harrison, 753, 771  
 Dietrichsen *v.* Cabburn, 497,  
     523  
 Dillon *v.* Cunningham, 715  
     — *v.* Parker, 214, 231  
 Dimech *v.* Corlett, 340, 141  
 Diplock *v.* Hammond, 97  
 Dixon *v.* Dixon, 353  
     — *v.* Enoch, 602  
     — *v.* Ewart, 446  
     — *v.* Gayfere, 139, 209  
     — *v.* Hammond, 592  
 Dixon's Trusts, *In re*, 397  
 Doble, *Ex parte*, 84, 86  
 Docker *v.* Somes, 153, 155, 507  
 Dodds *v.* Shepherd, 645  
 Doe *v.* Gay, 177  
     — *v.* Manning, 83  
     — *v.* Rusham, 84  
 Doherty *v.* Allman, 568  
 Doleret *v.* Rothschild, 526  
 Dolphin *v.* Layton, 721  
 Donaldson *v.* Donaldson, 75, 78,  
     148  
 Donne *v.* Hart, 345, 386  
 Donovan *v.* Brown, 755  
 Dormer *v.* Fortescue, 425  
 Douglas *v.* Culverwell, 298  
 Dowdeswell *v.* Dowdeswell, 650  
 Dowling *v.* Betjemann, 527  
     — *v.* Hudson, 114  
 Downe *v.* Morris, 301  
 Downs *v.* Jennings, 400  
 Downshire *v.* Sandys, 567  
 Dow *v.* Wheldon, 475  
 Doyle *v.* Kaufman, 640  
 Drant *v.* Vause, 188, 189  
 Drewe *v.* Corp, 545  
 Drew *v.* Martin, 127  
     — *v.* Power, 169  
 Drinkwater *v.* Ratcliffe, 588  
 Drysdale *v.* Mace, 549  
 Duberley *v.* Day, 386  
 Dublin, &c., Railway Company *v.*  
     Slattery, 692  
 Dubost, *Ex parte*, 70  
 Duchess of Westminster Silver  
     Lead Ore Co., *In re*, 744  
 Duckett *v.* Gover, 650  
 Duffield *v.* Elwes, 170, 175, 422  
 Duffy's Trusts, *Re*, 387  
 Dugdale *v.* Dugdale, 282  
 Dummer *v.* Pitcher, 227  
 Duncan, Fox & Co. *v.* North and  
     South Wales Bank, 488  
 Duncuft *v.* Albrecht, 526  
 Dundas *v.* Dutens, 86, 535  
 Dungey *v.* Angove, 593  
 Dunkirk Colliery Company *v.*  
     Lever, 704  
 Dunkley *v.* Dunkley, 396, 397  
 Dunnage *v.* White, 437  
 Dunne *v.* Dunne, 144  
 Durell *v.* Pritchard, 583  
 Durham *v.* Legard, 547  
     — Lord *v.* Wharton, 252  
 Dursley *v.* Fitzhardinge, 604, 605  
 Dutton *v.* Furness, 594  
 Dutton, *Re*, 119  
 Du Vigier *v.* Lee, 316  
 Dyer *v.* Dyer, 124, 126, 205  
 Dyke *v.* Rendall, 139  
 Dyson *v.* Pickles, 730  
 EADE *v.* Jacobs, 675  
 Eads *v.* Williams, 549  
 Earle *v.* Hopwood, 102  
 Earlom *v.* Saunders, 183, 191  
 Early *v.* Early, 277  
 East Indian Co. *v.* Boddam, 423  
     — *v.* Donald, 443  
     — *v.* Henchman, 474

- East Indian Company v. Veera-  
sawmy Moodely, 534  
Eastwood v. Vinke, 242  
Eaves v. Hickson, 149  
Ebrand v. Dancer, 125, 127  
Ede v. Knowles, 325  
Eden v. Naish, 742  
Edmunds v. Lowe, 243  
Edwards v. Clay, 528  
—— v. Freeman, 429  
—— *In re*, 412  
—— v. Jones, 73, 170, 172  
—— v. M'Leay, 454, 539  
—— v. Warden, 155  
—— v. West, 187  
Egerton v. Brownlow, 61  
Eldridge v. Burgess, 656  
Elibank v. Montolieu, 376, 384  
Ellard v. Llandaff, 454  
Ellershaw, *Re*, 627  
Ellice v. Roupell, 595  
Elliot v. Merryman, 114  
Elliott v. Cordell, 380, 381, 387  
—— *Ex parte*, 81  
—— v. Fisher, 191  
—— v. Turner, 337  
Ellis v. Lewis, 225  
—— v. Munson, 669  
—— v. Roupell (No. 1.), 32  
    Beav., 299, 604  
—— v. Selby, 119  
Ellison v. Ellison, 69, 70, 427  
—— v. Elwin, 390  
Elwor v. Vaughan, 638  
Emuss v. Smith, 188, 189, 192  
England v. Curling, 495, 496  
—— v. Downes, 399, 401  
—— v. Tredegar, 422  
Eno v. Tatham, 277  
Ernest v. Croysdill, 166  
Errington v. Aynsley, 523  
Erskine's Trusts, *Re*, 395, 396  
Esdaile v. Visser, 715  
Esposito v. Bowden, 498  
Essex v. Atkins, 351  
Etty v. Wilson, 737  
European Bank, *In re*, 336  
Evans v. Bagshaw, 586  
—— v. Bremridge, 490  
—— v. Davis, 660, 746  
—— v. Llewellyn, 434, 461  
Evans v. Wyatt, 281  
Evelyn v. Evelyn, 275  
Ewer v. Corbet, 113  
Ewing v. Osbaldiston, 522  
Eykyn's Trusts, *In re*, 247  
Eyre v. Countess of Shaftesbury,  
    408  
—— v. Cox, *In re* Jones, 640  
—— v. Hughes, 308  
FAIRTHORNE v. Weston, 501  
Faithful v. Ewen, 335  
Falcon v. Gray, 527  
Farebrother v. Gibson, 549  
—— v. Welchman, 559  
—— v. Wodehouse, 494  
Farina v. Silverlock, 578  
Farley, *Ex parte*, 326  
Farmer v. Farmer, 461  
—— v. Martin, 480  
Farquhar v. City of Toronto, 97  
Farquharson v. Cave, 173  
—— v. Floyer, 282, 290  
Farrant v. Blanchford, 168  
—— v. Lovel, 305  
Faulkner v. Daniel, 307  
Fawcett v. Lowther, 301  
Fawell v. Heelis, 140  
Featherstonhaugh v. Fenwick, 142,  
    498  
Fell v. Brown, 301  
Fellowes v. Gwydyr, 451  
Fellows v. Mitchell, 156  
Fells v. Read, 528  
Feltham v. Clark, 99  
Fenton v. Wills, 280  
Ferris v. Mullins, 324  
Fettiplace v. Gorges, 346, 350  
Field v. Donoughmore, 93  
—— v. Evans, 364  
—— v. G. N. Ry. Co., 743  
—— v. Moore, 409  
—— v. Sowle, 357  
Fielding v. Preston, 178, 281,  
    282  
Finch v. Hattersley, 268  
—— v. Shaw, 33  
Finney v. Hinde, 720  
Fisher v. Owen, 675  
—— v. Shirley, 262  
Fish v. Klein, 146

- Fishmongers' Company *v.* East India Company, 570  
 Fitch *v.* Weber, 194, 199  
 Fitzgerald *v.* Chapman, 393  
 Fleming *v.* Buchanan, 282  
 ——— *v.* Manchester, Yorkshire, and Lincolnshire Ry. Co., 748  
 Fletcher *v.* Ashburner, 182  
 ——— *Ex parte*, 319  
 Flight *v.* Bolland, 524  
 Fluker *v.* Taylor, 508  
 Foley *v.* Hill, 511  
 Forbes *v.* Adams, 207  
 Ford *v.* Hopkins, 166  
 ——— *v.* Taylor, 685  
 ——— *v.* White, 34  
 ——— *Re*, 397  
 Forrest *v.* Forrest, 127  
 Forster *v.* Hale, 58  
 Fortescue *v.* Barnett, 72  
 Fosbrooke *v.* Balguy, 152  
 Foster *v.* Foster, 195, 206, 407  
 ——— *v.* M'Kinnon, 153  
 ——— and Lister, *In re*, 86  
 ——— *v.* Underwood, 630  
 Fothergill *v.* Fothergill, 427  
 ——— *v.* Rowland, 564  
 Fourdrin *v.* Gowdey, 123, 293  
 Fowler *v.* Fowler, 257, 440  
 ——— *v.* Monmouth & Co., 744  
 Fowler's Trust, *Re*, 217  
 Fox *v.* Buckley, 167  
 ——— *v.* Mackreth, 153, 453, 473  
 Foxcroft *v.* Lester, 534  
 Francis *v.* Francis, 335  
 ——— *v.* Wigzell, 359  
 Franco *v.* Bolton, 614  
 Frank *v.* Frank, 206  
 Fraser *v.* Byng, 247  
 Freeman *v.* Cox, 699  
 ——— *v.* Pope, 82  
 ——— *v.* Lomas, 516  
 French *v.* Baron, 306  
 ——— *v.* Hobson, 168  
 ——— *v.* Macale, 338  
 Freshfield's Trust, *In re*, 99  
 Frewen *v.* Frewen, 190  
 Frith *v.* Cartland, 166  
 Fryer, *In re*, 156  
 Fullager *v.* Clarke, 448  
 Fuller *v.* Benet, 41  
 Fullwood *v.* Fullwood, 22  
 Fytche *v.* Fytche, 231  
 GAINSFORD *v.* Dunn, 292  
 Galatti *v.* Wakefield, 743  
 Gale *v.* Gale, 84, 90, 397  
 ——— *v.* Lindo, 465  
 Gall *v.* Fenwick, 277  
 Galsworthy *v.* Strutt, 340  
 Gardner *v.* Irvin, 677  
 ——— *v.* Marshall, 397  
 ——— *v.* Parker, 175  
 Garforth *v.* Bradley, 395  
 Garnett *v.* Bradley, 747, 749  
 Garrard *v.* Lauderdale, 91, 93  
 ——— *Ex parte*, 754  
 Garth *v.* Cotton, 567  
 Garthshore *v.* Chalie, 238  
 Gaskell's Trusts, *Re*, 365  
 Gay *v.* Labouchere, 675, 676  
 Geaves *v.* Strahan, 161  
 Gedge *v.* Montrose, 557  
 Gee *v.* Pritchard, 577  
 General Estates Co., *In re*, 100  
 ——— Meat Supply Association *v.* Bouffier, 84  
 Gervis *v.* Gervis, 281  
 Gething *v.* Keighley, 510  
 Giacometti *v.* Prodggers, 395, 396  
 Gibbins *v.* Eyden, 280, 290  
 Gibbons *v.* Caunt, 435  
 ——— *v.* London Financial Association, 764  
 Giffard *v.* Williams, 586  
 Gilbert *v.* Endean, 681, 744  
 ——— *v.* Lewis, 349  
 ——— *v.* Overton, 76, 77  
 ——— *v.* Smith, 588  
 Giles *v.* Giles, 444  
 Gill *v.* Downing, 144  
 Gillespie *v.* Hamilton, 497  
 Gilliat *v.* Gilliat, 479  
 Gillies *v.* Longlands, 205, 210  
 Gleaves *v.* Paine, 384  
 Glenorchy *v.* Bosville, 62  
 Glossop *v.* Heston and Isleworth Local Board, 627, 681  
 Glover *v.* Hall, 349  
 ——— *v.* Hartcup, 243  
 Goddard *v.* Snow, 400  
 Godfrey *v.* Godfrey, 105

- Godfrey *v.* Watson, 306, 307  
 Goggs *v.* Huntingtower, 634  
 Goldiecutt *v.* Townsend, 536  
 Goldsmid *v.* Goldsmid, 238, 241  
 Goldsmith, *In re*, 307  
 ——— *v.* Russell, 398  
 Goleborn *v.* Alcock, 28  
 Gomez, *Ex parte*, 520  
 Gompertz *v.* Pooley, 560  
 Good, *Ex parte*, 492  
 Goodbarne *v.* Fothergill, 755  
 Goodman *v.* Whitcomb, 500  
 Goodson *v.* Richardson, 570  
 Goold *v.* Teague, 190  
 Gordon *v.* Gordon, 435, 436  
 ——— *In re*, 209  
 ——— *v.* Graham, 315  
 Gore *v.* Knight, 352  
 Gough *v.* Bult, 112  
 Gould *v.* Okeden, 461  
 Gould *v.* Robertson, 94  
 Grace, *Ex parte*, 336  
 Graham *v.* Campbell, 735  
 ——— *v.* Johnson, 100  
 ——— *v.* Londonderry, 289, 347,  
     372, 373, 374  
 ——— *In re*, 404  
 Granard *v.* Dunkin, 577  
 Grant *v.* Grant, 347, 372  
 ——— *v.* Holland, 745  
 ——— *v.* Banque, &c., 745  
 Graves *v.* Graves, 268  
 Gray *v.* Chiswell, 503  
 Great Luxembourg R. Co. *v.*  
     Magnay, 153  
 Greaves *v.* Fleming, 665, 745  
 Greedy *v.* Lavender, 389, 395  
 Green *v.* Bridges, 342  
 ——— *v.* Farmer, 512  
 ——— *v.* Lyon, 2  
 ——— *v.* Marsden, 106  
 ——— *v.* Otte, 396  
 ——— *v.* Price, 341  
 Greenaway, *Ex parte*, 423, 431  
 Greene *v.* Greene, 273  
 Greenwood *v.* Greenwood, 245, 436  
 Gregory *v.* Lockyer, 360  
 ——— *v.* Mighell, 533  
 ——— *v.* Wilson, 342  
 Grenfel *v.* Dean and Canons of  
     Windsor, 101  
 Gresley *v.* Mousley, 471  
 Gretton *v.* Haward, 216  
 Greville *v.* Browne, 292  
 Grey *v.* Grey, 129  
 Grice *v.* Richardson, 334  
 Griesbach *v.* Freemantle, 209  
 Grievson *v.* Kirsopp, 184  
 Griffin *v.* Allen, 744  
 Griffith *v.* Ricketts, 94, 184, 201  
 Grimstone, *Ex parte*, 406  
 Grindell *v.* Brendon, 88  
 Grissel's Case, 515  
 Grissell, *In re*, *Ex parte* Jones,  
     359  
 Grosvenor *v.* Drax, 414  
 Grove *v.* Price, 16  
 Groves *v.* Groves, 126  
 Gude *v.* Worthington, 111  
 Gunter *v.* Halsey, 530, 532  
 Gutierrez, *Ex parte*, *In re*  
     Gutierrez, 717  
 Gwynne *v.* Edwards, 286  
 HADDON *v.* Fladgate, 347  
 Haigh *v.* Jaggar, 550  
 Haldane *v.* Eckford, 657  
 Hale *v.* Saloon Omnibus Co., 594  
 ——— *v.* Webb, 429  
 Hall, *Ex parte*, 97  
 ——— *v.* Hall (3 Atk. 721), 405  
 ——— *v.* Hall (12 Beav. 414),  
     497, 498  
 ——— *v.* Hall (L. R. 8 Ch. App.  
     430), 480, 612  
 ——— *v.* Hill, 247, 258  
 ——— *v.* Potter, 465  
 ——— *v.* Waterhouse, 351  
 Hamer *v.* Giles, 747  
 Hamilton *v.* Watson, 483  
 ——— *v.* Wright, 151, 473  
 Hammersley *v.* De Biel, 536  
 Hanbury *v.* Kirkland, 157  
 Hanby *v.* Roberts, 290  
 Hancock *v.* Guerin, 674, 677  
 Hancocks *v.* Lablache, 652  
 Hankin *v.* Turner, 746  
 Hannah *v.* Hodgson, 469  
 Hansard *v.* Robinson, 425, 426  
 Hanson, *Ex parte*, 140, 516  
 ——— *v.* Derby, 310  
 ——— *v.* Keating, 377

- Hanson *v.* Stubbs, 263, 264  
 Harbin *v.* Darby, 151  
 Harbord *v.* Monk, 675  
 Harden *v.* Parsons, 168  
 Harding *v.* Harding, 277  
 ———, *In the goods of*, 344  
 Hardy, *Ex parte*, 188  
 ——— *v.* Martin, 339  
 Harmood *v.* Oglander, 266, 290  
 Harms *v.* Parson, 466  
 Harnett *v.* Yielding, 521, 549,  
     550  
 Harrison *v.* Foreman, 180  
 ——— *v.* Forth, 36  
 ——— *v.* Guest, 455, 456  
 ——— *v.* Harrison, 152  
 ——— *v.* Nettleship, 558  
 ——— *v.* Tennant, 499, 500  
 ——— *v.* Wearing, 745  
 Harris *v.* Gamble, 663  
 ——— *v.* Petherick, 743  
 ——— *v.* Warre, 661  
 Hart, *In re*, 319  
 ——— *v.* Swaine, 545  
 Hartwell *v.* Hartwell, 467  
 Hastie *v.* Hastie, 167  
 Haselfoot's Estate, *In re*, 316, 332  
 Hastings, *In re*, 263  
 Hatch *v.* Hatch, 469, 470, 471  
 Hatchell *v.* Eggleso, 378  
 Hatcher, *Ex parte*, 369  
 Hatfield *v.* Minet, 256  
 Hawes *v.* Wyatt, 461  
 Hawkins *v.* Blewitt, 175  
 ——— *v.* Day, 429  
 ——— *v.* Holmes, 532  
 Hawthorn *v.* Shedden, 178, 282  
 Haycock's Policy, *In re*, 511  
 Hayes *v.* Garvey, 257  
 Haymes *v.* Cooper, 335  
 Haynes *v.* Mico, 242, 244  
 Headley *v.* Redhead, 281  
 Heames *v.* Bance, 316  
 Heap *v.* Tonge, 91  
 Hearle *v.* Greenbank, 146, 223  
 Heath *v.* Crealock, 33  
 ——— *v.* Sansom, 498  
 Heatley *v.* Thomas, 356  
 Hedges *v.* Hedges, 275  
 Heighington *v.* Grant, 169  
 Henderson *v.* Graves, 38  
 Heneage, *Re*, 359, 366  
 Henkle *v.* Royal Exchange Association Company, 543  
 Henley & Co., Limited, *Re*, 262  
 Hensman *v.* Fryer, 281, 290, 291  
 Hepworth *v.* Hill, 276  
 Herbert's Case, 408  
 Herbert *v.* Salisbury and Yeovil Railway Company, 339  
 Hercy *v.* Birch, 495, 524  
 Heritage, *In re*, 750  
 Herne Bay Co., *In re*, 320  
 Hervey *v.* Hervey, 427  
 Hewison *v.* Negus, 86  
 Hewitson *v.* Sherwin, 715  
 Hewitt *v.* Loosemore, 40, 327  
 ——— *v.* Kaye, 175  
 ——— *v.* Wright, 185  
 Heydon's Case, 5  
 Heysham *v.* Heysham, 411  
 Hibbert *v.* Cooke, 143  
 ——— *v.* Rolleston, 446  
 Hickley *v.* Hickley, 154  
 Hickman *v.* Upsall, 304, 320  
 Hiern *v.* Mill, 317  
 Higginson *v.* Hall, 675  
 Higgins *v.* Samels, 549  
 ——— *v.* Senior, 125  
 Higgs *v.* Schrader, 335  
 Hill *v.* Astley, 318  
 ——— *v.* Barclay, 342  
 ——— *v.* Buckley, 547  
 ——— *v.* Caillovel, 100  
 ——— *v.* Edmonds, 378  
 ——— *v.* Lane, 449  
 ——— *v.* Simpson, 114  
 ——— *v.* Wormsley, 276  
 Hilliard *v.* Fulford, 260  
 Hillman, *Ex parte*, 84, 86  
 Hilton *v.* Barrow, 614  
 ——— *v.* Jones, 269  
 Hinchinbroke, *v.* Seymour, 480  
 Hinckman *v.* Smith, 476  
 Hindmarsh, *In re*, 507  
 Hinricks *v.* Berndes, 558, 627  
 Hipwell *v.* Knight, 548  
 Hirst, *Ex parte*, 319  
 Hitchman *v.* Stewart, 489  
 Hoare *v.* Bremridge, 447  
 Hobson *v.* Blackburn, 293  
 ——— *v.* Ferraby, 410



Hobson v. Trevor, 59  
Hodgens v. Hodgens, 410  
Hodges' Settlement, *In re*, 404  
Hodges v. Smith, 593  
Hodgson v. Fox, 515  
—— v. Hodgson, 351  
—— v. Shaw, 487  
Hodson v. Mochi, 654, 666  
Hofman, *In re*, 302  
Hogg v. Kirby, 573  
Holderstaffe v. Saunders, 558  
Holdich v. Holdich, 225  
Holland, *Ex parte*, 359  
—— v. Holland, 166  
Holloway v. Millard, 81  
—— v. Radcliffe, 204  
Holman v. Loynes, 471  
Holme v. Brunskill, 490  
Holmes v. Coghill, 282  
—— v. Penney, 83, 398  
Holroyd v. Marshall, 95  
Holt, *In re*, 716  
—— v. Holt, 128, 144, 310  
Holyman, *Ex parte*, 474  
Honeyman v. Marryat, 548  
Honner v. Morton, 389  
Honor v. Honor, 442  
Honywood v. Forster, 228  
Hood v. Hood, 276  
Hooley v. Hatton, 246  
Hooper v. Giles, 664  
—— v. Smart, 271  
Hope v. Carnegie, 555  
Hopper v. Conyers, 166  
Hore v. Becher, 438  
Horner v. Flintoff, 340  
Hornsby v. Lee, 390  
Horrock v. Rigby, 547  
Hovey v. Blakeman, 159  
How v. Wheldon, 468  
Howard v. Digby, 371, 372  
—— v. Harris, 297  
—— v. Hopkyns, 338  
Howe v. Hunt, 550  
—— v. Lord Dartmouth, 163  
Howel v. Price, 300  
—— v. West, 661  
Howorth v. Dewell, 106  
Howson v. Hancock, 468  
Huckman, *In re*, 705  
Hudson v. Bartram, 458

Hudson v. Buck, 550  
Hue v. Richards, 499  
Huggons v. Tweed, 666  
Hughes, *Ex parte*, 270  
—— v. Jones, 44  
—— v. Kearney, 137, 139  
—— v. Morris, 534  
—— v. Wynne, 266  
Hulme v. Coles, 491  
Hulme v. Tenant, 350, 356, 359  
Humphrey v. Richards, 352  
Humphreys v. Edwards, 648  
Hungerford v. Clay, 310  
Hunt v. City of London Real  
Property Co., 629, 686, 737  
Hunt v. Peake, 571  
Hunter v. Belcher, 510  
—— v. Daniel, 102  
—— v. Young, 650  
Huntingdon v. Huntingdon, 323  
Hurd v. Billington, 615  
Hurst v. Beach, 178, 246, 247  
Hutchins v. Romer, *Ex parte*,  
746  
Hutchinson v. Tennant, 105  
Hyam's Case, 467  
Hylton v. Hylton, 470  
IMBERT, *Ex parte*, 518  
Imperial Mercantile Credit Asso-  
ciation v. Coleman, 153, 474  
Ingle v. Richards, 473  
Inglefield v. Coghlan, 349  
Innes v. Sayer, 123, 427  
Insley v. Jones, 630  
International, &c., Co. v. Mos-  
cow, &c., Co., 735  
Irlam v. Irlam, 730  
Irnham v. Child, 433  
Irvine v. Ironmonger, 280  
Ivory, *In re*, 746  
Izaacson v. Harwood, 166  
Izod v. Izod, 111  
JACKSON v. Innes, 323  
—— v. Jackson, 135  
—— v. Parker, 323  
Jacob v. Lucas, 161  
Jacobs, *Ex parte*, 492  
—— *In re*, 492  
Jacquet v. Jacquet, 266

- Jamaica, Att.-Gen. of, *v.* Mander-  
     son, 518  
 James *v.* Crow, 698  
     — *v.* Dean, 142  
     — *v.* James, 325  
     — *v.* Kynnier, 514  
     — *v.* Rice, 325  
     — *v.* Rumsey, 309  
 Jaques *v.* Miller, 545, 580  
 Jarman's Estate, *In re*, 119  
 Jauncy *v.* Knowles, 500  
 Jebb *v.* Abbott, 114  
 Jeffereys *v.* Small, 134  
 Jefferson *v.* Bishop of Durham,  
     551, 566  
 Jefferys *v.* Fairs, 540  
     — *v.* Jefferys, 68, 522  
 Jeffrys *v.* Vanteswarstwarth, 406  
 Jeffs *v.* Day, 560  
     — *v.* Wood, 513  
 Jenney *v.* Andrews, 353  
 Jennings *v.* Ward, 297  
 Jervoise *v.* Duke of Northumber-  
     land, 61  
     — *v.* Jervoise, 372, 373  
 Jessel *v.* Chaplin, 584  
 Jessopp *v.* Watson, 197, 199  
 Job *v.* Job, 260, 263, 429, 556  
 Johns *v.* James, 94  
 Johnson *v.* Atkinson, 593  
     — *v.* Child, 291  
     — *v.* Gallacher, 359  
     — *v.* Gallagher, 359  
     — *v.* Kennett, 114  
     — *v.* Lawson, 163  
     — *v.* Legard, 90  
     — *v.* Lord Harrowby, 293  
     — *v.* Mounsey, 304  
     — *v.* Ogilby, 467  
 Johnson's Infants, *In re*, 403  
 Johnstone *v.* Lumb, 353  
 Jones, *Ex parte*, *In re* Grissell,  
     359  
     — *In re*, 280, 640  
     — *v.* Caless, 280  
     — *v.* Chennell, 745  
     — *v.* Clifford, 439, 539  
     — *v.* Davies, 323  
     — *v.* Foxall, 167  
     — *v.* Green, 341  
     — *v.* Higgins, 351  
 Jones *v.* Lewis, 150, 429  
     — *v.* Lock, 69  
     — *v.* Lloyd, 416  
     — *v.* Noy, 500  
     — *v.* Powles, 164  
     — *v.* Selby, 174, 176  
     — *v.* Smith, 38, 316, 329  
     — *v.* Thomas, 589  
     — *v.* Williams, 327  
 Jordan *v.* Money, 538  
 Joselyne, *Ex parte*, 270  
 Joy *v.* Campbell, 149, 158, 168  
 Joyce *v.* De Moleyns, 32  
 Joynes *v.* Statham, 538, 542  
  
 KAY *v.* Johnson, 336  
     — *v.* Smith, 168  
 Keane *v.* Roberts, 113  
 Kearsley *v.* Cole, 493  
 Keat *v.* Allen, 465  
 Keech *v.* Hall, 306  
     — *v.* Sandford, 142, 153  
 Keene *v.* Biscoe, 297  
 Keily *v.* Monck, 466  
 Kekewich *v.* Manning, 77  
 Kellock's Case, 270  
 Kelly & Co., *Ex parte*, 520  
 Kemble *v.* Farren, 340  
 Kemp *v.* Pryor, 422, 615  
     — *v.* Waddingham, 263  
     — *v.* Westbrook, 329, 330  
 Kempson *v.* Ashbee, 469  
 Kendall, *Ex parte*, 286  
     — *v.* Abbott, 439, 440  
     — *v.* Hamilton, 440  
 Kennedy *v.* Daly, 164  
 Kennell *v.* Abbott, 444, 445  
 Kenney *v.* Wexham, 527  
 Kensington, *Ex parte*, 325  
     — *v.* Dollond, 349  
     — *v.* Mansell, 598  
 Kent *v.* Allen, 458  
 Kerr *v.* Bain, 474  
 Kerr's Policy, *Re*, 325  
 Keys *v.* Williams, 325  
 Khedive, The, 724  
 Kidney *v.* Coussmaker, 230, 271  
 Kiffin *v.* Kiffin, 405  
 Kimber *v.* Barber, 153  
 Kincaid's Trusts, *Re*, 397  
 Kinderley *v.* Jervis, 269, 314

- King *v.* Denison, 130  
 ——— *v.* Hamlet, 477  
 ——— *v.* Hawkesworth, 749  
 ——— *v.* King, 222  
 ——— *v.* Savery, 477  
 ——— *v.* Smith, 304, 568  
 ——— *v.* Timmerman, 425  
 ——— *v.* Withers, 180  
 Kingsford *v.* Swinford, 560  
 Kinnaird *v.* Webster, 493  
 Kintrea, *Ex parte*, 467  
 Kirk *v.* Bromley Union, 534  
 ——— *v.* Clark, 85  
 ——— *v.* Eddowes, 258  
 Kirkman *v.* Miles, 209  
 Kirkwood *v.* Webster, 744  
 Kirwan *v.* Daniel, 94  
 Knatchbull *v.* Greuber, 44, 545,  
     546  
 Knight *v.* Bowyer, 102  
 ——— *v.* Knight, 103, 395  
 Knott, *In re*, 270  
 Knox *v.* Gye, 22, 154, 500, 502  
 Krehl *v.* Burrell, 581, 754  
 Kronheim *v.* Johnson, 53, 75  
  
 LACEY, *Ex parte*, 472, 473  
 ——— *v.* Hill, 503  
 ——— *v.* Ingle, 314  
 Lacon *v.* Allen, 326  
 ——— *v.* Mertins, 532  
 La Grange *v.* M'Andrew, 740  
 Lake *v.* Brutton, 493  
 ——— *v.* De Lambert, 146  
 ——— *v.* Gibson, 46, 134, 143  
 Lambarde *v.* Older, 516  
 Lambe *v.* Eames, 105, 107  
 Lambton, *Ex parte*, 321  
 Lamotte, *Re*, 414  
 Lamplugh *v.* Lamplugh, 129  
 Lance *v.* Aglionby, 273  
 ——— *v.* Norman, 399  
 Lancefield *v.* Iggulden, 280, 281,  
     282, 290, 291  
 Landore Siemens' Steel Co., *In*  
     *re*, 552, 734, 738  
 Lane *v.* Dighton, 126  
 Lanesborough *v.* Jones, 513  
 Langley *v.* Thomas, 109  
 Langton *v.* Boylston, 590  
 ——— *v.* Horton, 99, 557  
  
 Lancy *v.* Duke of Athole, 287  
 Lassence *v.* Tierney, 535  
 La Touche *v.* Earl of Lucan,  
     94  
 Laurretta, The, 753  
 Laver *v.* Fielder, 45  
 Law *v.* East India Co., 493  
 ——— *v.* Garrett, 561  
 Lawes *v.* Bennet, 187, 189  
 Lawrence *v.* Lawrence, 224  
 ——— *c.* Smith, 575  
 Leary *v.* Shout, 500  
 Leaver *v.* Clayton, 119  
 Le Blanche *v.* Reuter's Telegraph  
     Company, 630, 751  
 Lechmere *v.* Brotheridge, 350  
 ——— *v.* Earl of Carlisle, 232,  
     235  
 ——— *v.* Lechmere, 201  
 Lee *v.* Clutton, 36, 40  
 ——— *v.* Pain, 247  
 Leech *v.* Schweider, 571  
 Leeds *v.* Barnardiston, 408  
 Leeming, *Re*, 417  
 Lees *v.* Nuttal, 474  
 ——— *v.* Patterson, 624, 666  
 Legal *v.* Miller, 544  
 Legg *v.* Goldwire, 441, 442  
 Leigh *v.* Earl of Warrington,  
     267  
 Leigh's Estate, *In re*, 144  
 Leitch *v.* Leitch, 559  
 Leith *v.* Irvine, 297  
 Lempriere *v.* Lange, 462  
 Lench *v.* Lench, 125, 139,  
     237  
 Le Neve *v.* Le Neve, 35, 41  
 Leonard *v.* Sussex, 67  
 Leonino *v.* Leonino, 277  
 Leslie's Settlement Trusts, *In re*,  
     143  
 Lester *v.* Foxcroft, 533  
 Le Vasseur *v.* Scrutton, 390  
 Leveson, *In re*, 295  
 Levy *v.* Lovell, 713  
 Levy *v.* Walker, 498  
 Lewellin *v.* Cobbold, 400  
 Lewers *v.* Earl of Shaftesbury,  
     581  
 Lewis's Trust, *Re*, 395  
 Lewis Bowle's Case, 567

- Lewis v. Fullerton, 575  
 ——— v. Hillman, 471  
 ——— v. Jones, 439  
 ——— v. Nangle, 301  
 ——— v. Nobbs, 155  
 ——— v. Rees, 84  
 Liddard v. Liddard, 105  
 Life Association of Scotland v. Siddal, 381  
 Lilford, Lord, v. Powys-Keek, 291  
 Lincoln v. Wright, 538  
 Linden, *Ex parte*, 336  
 Lindsay v. Gibbs, 95  
 Little v. Neil, 112  
 Litton v. Litton, 697, 699  
 Lloyd v. Atwood, 168  
 ——— v. Banks, 38  
 ——— v. Clark, 556  
 ——— v. David Lloyd & Company, 729, 743  
 ——— v. Dimmack, 658  
 ——— v. Jones, 648  
 ——— v. Mason, 393, 394  
 ——— v. Passingham, 54  
 ——— v. Williams, 393, 394  
 Lockhart v. Hardy, 321, 322  
 Lockwood v. Ewer, 330  
 Loffus v. Maw, 21  
 London Assurance Company v. Mansel, 455  
 ——— City of, v. Levy, 588  
 ——— Chartered Bank of Australia v. Lempriere, 345, 355  
 ——— & County Banking Company v. Dover, 320  
 ——— & Provincial Bank v. Bogle, 370  
 ——— v. Roffey, 628, 630  
 ——— Syndicate v. Lord, 699  
 Long v. Long, 410  
 Longbottom, *Ex parte*, 627  
 Longman v. East, 509, 704  
 ——— v. Winchester, 576  
 Longmate v. Ledger, 457, 461  
 Longendale Cotton Spinning Co., *In re*, 530  
 Loosemore v. Knapman, 275  
 Lord Raymond's Case, 408  
 Loscombe v. Russell, 501  
 ——— v. Wintringham, 120  
 Lovell v. Galloway, 600  
 ——— v. Newton, 366  
 Lovel's Case, 301  
 Loveridge v. Cooper, 23  
 Lovett v. Lovett, 619  
 Lowe v. Lowe, 754  
 Lowther v. Lowther, 474  
 Lowthian v. Hasel, 316  
 Lucas v. Comerford, 523  
 ——— v. Denison, 304  
 ——— v. Lucas, 373  
 Luckraft v. Fridham, 294  
 Luke v. South Kensington Hotel Company, 301  
 Luker v. Dennis, 561  
 Lumb v. Milnes, 349  
 Lumley v. Wagner, 522, 562, 563  
 Lunham v. Blundell, 150  
 Lupton v. White, 150, 167  
 Lush's Trusts, *In re*, 168, 395  
 Lutkins v. Leigh, 291  
 Lynn v. Beaver, 132  
 Lyon v. Home, 470  
 Lysaght v. Walker, 518  
 MACANDREW v. Barker, 753  
 Macaulay v. Phillips, 376, 394  
 Macbryde v. Weeks, 549  
 Macclesfield v. Davis, 528  
 Macdonald v. Carrington, 662  
 ——— v. Irvine, 163  
 Mackenzie v. Johnston, 506  
 ——— v. Robinson, 310  
 ——— v. Shephard, 637  
 Mackinnon v. Stewart, 94  
 Mackley v. Chillingworth, 749  
 Mackreth v. Symmons, 137, 139  
 Macpherson v. Watt, 153  
 Maddy v. Hale, 144  
 Madeley v. Booth, 545  
 Magnan v. Parry, 437  
 Mainwaring v. Newman, 504  
 Maitland v. Irving, 485  
 Major v. Lansley, 350  
 Malden v. Menill, 431, 437  
 Malins v. Freeman, 540  
 Maltby's Case, 485  
 Manby v. Bewicke, 459  
 Manlove v. Bale, 307  
 Manning v. Purcell, 179

- Manning v. Spooner, 279  
 Mansell v. Mansell, 428  
 Manser v. Back, 541  
 Manson v. Baillie, 148  
 ——— v. Thacker, 546  
 Mare v. Sandford, 472  
 Marsh v. Lee, 318  
 Marshall v. Coleman, 496  
 ——— v. Fowler, 396  
 ——— v. Ross, 579  
 ——— v. Shrewsbury, 321, 325  
 ——— v. Watson, 496  
 Martin, *Ex parte*, 629  
 ——— v. Bannister, 629  
 ——— v. Morgan, 454  
 ——— v. Nutkin, 523, 562  
 ——— v. Pycroft, 543  
 ——— v. Trimmer, 210  
 ——— v. Wright, 573  
 Mason v. Harris, 650  
 ——— v. Morley, 167  
 ——— v. Seney, 469  
 ——— v. Taylor, *In re*, 334  
 Massey v. Allen, 745  
 ——— v. Parker, 349  
 Master v. Fuller, 357  
 ——— v. Hansard, 561  
 Mathew v. Northern Assurance  
 Company, 511  
 Matthew v. Brise, 150, 402  
 Matthews v. Wallwyn, 511  
 Matthewman's Case, 358  
 Matthias v. Matthias, 638  
 Maunsell v. White, 538  
 Maxwell v. Montacute, 298, 538  
 ——— v. Wettenfall, 180  
 May v. Bennett, 420  
 ——— v. Hook, 558  
 ——— v. Roper, 207  
 Mayall v. Higbey, 584  
 Mayd v. Field, 253, 358  
 Mayer v. Murray, 309, 556  
 Mayhew v. Crickett, 493  
 M'Cann v. Dempsey, 461, 471  
 M'Donell v. Hesilrige, 84  
 Meacher v. Young, 410  
 Meares, *In re*, 416  
 Meek v. Kettlewell, 77  
 Meggison v. Moore, 105  
 Mellers v. Devonshire (Duke of),  
 430  
 Mellin v. Monico, 509, 704  
 Mellish v. Vallins, 279  
 Meluish v. Milton, 21, 444, 620,  
 621  
 Mercers' Co., *Ex parte*, 747, 749  
 Mercier v. Cotton, 675  
 Meredith v. Heneage, 105  
 Merry v. Nichols, 745  
 Messenger, *In re*, 334  
 Metcalfe v. Hutchinson, 268  
 Mews v. Mews, 347  
 M'Fadden v. Jenkins, 58, 75  
 M'Henry v. Davies, 352  
 Miall v. Brain, 225  
 Michelmores v. Mudge, 385  
 Micklethwaite v. Micklethwaite,  
 567  
 Middleton v. Greenwood, 582  
 ——— v. Magnay, 581  
 ——— v. Pollock, 81  
 ——— v. Spicer, 131  
 Mignan v. Parry, 442  
 Mildmay v. Quicke, 195  
 Miles v. Harrison, 123, 294  
 ——— v. Thomas, 496  
 Mill v. Hill, 142  
 Miller v. Beal, 302  
 ——— v. Cooke, 476  
 Millett v. Davey, 310  
 Mills v. Farmer, 122  
 ——— v. Fowkes, 519  
 ——— v. Haywood, 549  
 Milltown, Earl of, v. Stewart, 613  
 Milner v. Milner, 444  
 Milnes v. Slater, 279, 281  
 Milroy v. Lord, 79, 80  
 Milward v. Thanet, 549  
 Mirehouse v. Scaife, 281  
 Mitchell, *Ex parte*, 407  
 ——— v. Hayne, 590  
 ——— v. Smith, 171  
 Mitchell's Trusts, *In re*, 753  
 Mitchelmores v. Mudge, 390  
 Mitchel's Trade Mark, *In re*, 578  
 M'Henry v. Davies, 357  
 M'Kenzie v. Hesketh, 547  
 M'Neile v. Chambers, 412  
 Moet v. Pickering, 335  
 Moggridge v. Thackwell, 120, 122  
 Molony v. Kennedy, 353  
 Monck v. Monck, 249

- Montacute v. Maxwell, 475  
 Montague v. Dudman, 558  
 ——— v. Flockton, 564  
 Montefiore v. Brown, 94  
 Montefiori v. Montefiori, 537  
 Moodie v. Reid, 446  
 Moor v. Rycault, 389, 398  
 Moore v. Anglo-Italian Bank, 270  
 ——— v. Blake, 549  
 ——— v. Darton, 171, 173, 174  
 ——— v. Moore, 175, 279  
 ——— v. Vinten, 344  
 Moors v. Marriott, 262  
 More v. More, 408  
 Morgan v. Higgins, 472  
 ——— v. Malleson, 171  
 ——— v. Marsack, 591  
 ——— v. Minett, 470  
 ——— v. Morgan, 351  
 ——— v. Swanson, U. S. Authority, 142  
 Morice v. Bishop of Durham, 116  
 Morley v. Bird, 134  
 ——— v. Morley, 150, 269  
 Mornington v. Keane, 236  
 Morphet v. Jones, 533  
 Morrell v. Wootten, 97  
 Morret v. Paske, 153, 313, 315  
 Morrice v. Bishop of Durham, 119  
 ——— v. Bank of England, 557  
 Morris v. Barrett, 135  
 ——— v. Chambers, 139  
 ——— v. Morris, 567  
 Mortimer v. Capper, 430, 439  
 Mortlock v. Buller, 547, 550  
 Moseley v. Virgin, 523  
 Moss, *Ex parte*, 324  
 Mountfort, *Ex parte* (14 Ves. 606), 330; (15 Ves. 445), 405  
 M'Pherson v. Watt, 474  
 M'Queen v. Farquhar, 546  
 Muckleston v. Brown, 110  
 Mucklow v. Fuller, 156  
 Mulkern v. Lord, 497, 561  
 Mullins v. Smith, 180, 181  
 Mumford v. Stohwasser, 165, 313  
 Mundy v. Jolliffe, 533  
 Murray v. Barlee, 266, 346, 357, 358  
 ——— v. Elibank, 394  
 ——— v. Parker, 440  
 Musical Compositions, &c., *In re*, 746  
 Mutlow v. Bigg, 209  
 ——— v. Mutlow, 265  
 Myers v. Defries, 743  
 NASH v. Hodgson, 519  
 National Bank of Australasia v. United Hand in Hand and Band of Hope Company, 308  
 ——— Funds Assurance Company, *Re*, 754  
 Naylor v. Winch, 435  
 Neale v. Neale, 436  
 Neesom v. Clarkson, 143, 565  
 Neilson v. Betts, 507  
 Nelson v. Stocker, 44, 400, 451  
 Nerot v. Burnard, 498  
 Neve v. Pennell, 317  
 Nevill's Case, 492  
 Neville v. Wilkinson, 465, 537  
 Newcomen v. Coulson, 687  
 New B. M. I. Co. v. Reed, 677  
 Newby v. Sharpe, 660  
 Newhouse v. Smith, 275  
 Newlands v. Paynter, 348, 352, 363, 556  
 Newman, *In re*, 472  
 ——— v. Bateson, 180  
 ——— v. Selfe, 320  
 Newmarch, *In re*, 279  
 ——— v. Storr, 279  
 New Sombrero Company v. Er-langer, 152, 458  
 Newstead v. Seales, 90  
 Newton v. Charlton, 486  
 New Westminster Brewery Co. v. Hannah, 681  
 Nichol v. Stockdale, 573  
 ——— v. Tackaberry, 531  
 Nicholson v. Drury Buildings, 347  
 ——— v. Hooper, 143, 565  
 ——— v. Knowles, 592  
 ——— v. Revell, 492, 493  
 ——— v. Tutin, 94  
 N. & N. P. Benefit Building Society, *In re*, 307  
 Noakes v. Noakes, 738  
 Noble v. Edwards, 549  
 Nokes v. Gibbon, 332

- Norrington, *In re*, 151  
 Norris v. Caledonian Insurance Company, 144  
 North v. Ansell, 457  
 Northampton, &c., Co. v. Midland Wagon Co., 746  
 North British Insurance Company v. Lloyd, 484  
 Norton v. L. & N. W. Ry. Co., 744  
 Nottidge v. Prince, 470  
 Nottley v. Palmer, 224  
 Noyes v. Crawley, 154, 500  
 N. P. Insurance Co. v. P. Assurance Co., 571
- OAKES v. Turquand, 457  
 Oakwell Collieries Co., *In re*, 529  
 O'Brien v. Lewis, 471  
 O'Connor v. Spaight, 508  
 Odessa Tramways v. Mendel, 526  
 Oger v. Bradnum, 646  
 Oldham v. Hughes, 206  
 Olive, *Re*, 409  
 Oliver v. Brickland, 239  
 Oliver v. Oliver, 397  
 Onions v. Cohen, 611  
 Orby v. Trigg, 297  
 Original Hartlepool Colliery Co. v. Gibb, 669  
 Ormond v. Hutchinson, 434  
 Orr v. Diaper, 602  
 Orrell Colliery, *In re*, 696  
 Osborn v. Morgan, 375, 388, 395  
 Osborne, *Ex parte*, 307  
 ——— v. Homburg, 629  
 ——— v. Williams, 468  
 Oswell v. Probert, 376  
 Overton v. Banister, 44  
 Owen v. Henshaw, 335  
 Owen v. Homan, 357  
 Owen v. Wynn, 677  
 Owens v. Dickenson, 276, 357, 360  
 Oxenden v. Compton, 417
- PADBURY v. Clark, 231  
 Paddon v. Richardson, 161  
 Padley v. Camphausen, 537  
 Padwick v. Hurst, 508  
 ——— v. Stanley, 486, 507
- Page v. Bennet, 343  
 Pain v. Coombs, 533  
 Painter v. Newby, 547  
 Palmer v. Hendrie, 322, 557  
 ——— v. Neave, 465  
 Palmer's Case, 520  
 Pankhurst v. Howell, 249  
 Papillon v. Voice, 65, 66  
 Pardo v. Bingham, 265, 282  
 Parfitt v. Chambre, 338  
 Paris v. Gilham, 591  
 Paris Skating Rink Co., *In re*, 102  
 Parker v. Brook, 348, 349  
 ——— v. Lewis, 452  
 ——— v. Taswell, 69, 543, 550  
 Parkes v. White, 168, 365  
 Parkin v. Thorold, 548  
 Parnell v. Hingston, 130  
 Parrot v. Sweetland, 138  
 Parsons v. Hayward, 499  
 ——— v. Tinling, 747  
 Patey v. Flint, 695  
 ——— v. Patey, 500  
 Pawlett v. Pawlett, 180  
 Payne v. Mortimer, 263  
 Peachy v. Duke of Somerset, 47  
 Peacock v. Evans, 476  
 Peacock v. Harper, 681  
 ——— v. Monck, 350  
 ——— v. Peacock, 498  
 ——— v. Penson, 550  
 Peacock's Estate, *Re*, 256  
 ——— Trusts, *In re*, 347  
 Peake v. Highfield, 611  
 Pearce v. Crutchfield, 408  
 ——— v. Loman, 293  
 Pearl v. Deacon, 493  
 Pearson v. Amicable Assurance, 74  
 ——— v. Cardon, 592  
 ——— v. Scott, 114  
 Pedder's Settlement, *Re*, 210  
 Peek v. Gurney, 452  
 Peets v. Lambert, 545  
 Pemberton v. M'Gill, 352  
 Pembroke v. Friend, 276, 278  
 Pembroke v. Thorpe, 532  
 Penfold v. Mould, 79  
 Penn v. Lord Baltimore, 530  
 Pennington v. Brinsop Hall Coal Company, 570, 571, 572

- Penny *v.* Avison, 167  
 Percival *v.* Phipps, 577  
 Perkins *v.* Ede, 546  
 Perry *v.* Phelps, 557  
 Persse *v.* Persse, 437  
 Peto *v.* Brighton, Uckfield, and  
     Tunbridge Wells Ry., 564  
 Petre *v.* Espinasse, 612  
 Phillips, *Ex parte*, 406, 417  
     — *v.* Gill, *Re*, 734, 738  
     — *v.* Gutteridge, 317  
     — *v.* Parry, 279  
     — *v.* Phillips (10 W. R. 237),  
         28, 33  
     — *v.* Phillips (1 M. & K.  
         649), 502  
     — *v.* Phillips (4 Q. B. Div.  
         127), 671  
     — *v.* Phillips (W. N. 1879,  
         p. 96), 678  
     — *v.* Phillips, (9 Hare, 475),  
         507, 509  
 Philpot *v.* Jones, 518  
 Picard *v.* Hine, 357  
 Pickard *v.* Roberts, 387  
 Pickering *v.* Pickering, 435  
 Pickersgill *v.* Rodger, 216  
 Pidcock *v.* Bishop, 484  
 Pierpoint *v.* Cheney, 410  
 Pierce *v.* Waring, 469  
 Pigott *v.* Pigott, 378  
     — *v.* Stratton, 481, 565  
     — *v.* Williams, 514  
 Pike *v.* Nicholas, 575  
 Pilcher *v.* Arden, 335  
     — *v.* Hinds, 662  
     — *v.* Rawlins, 28, 161, 313  
 Pile *v.* Pile, 321  
 Pinchin *v.* Simms, 243  
 Pinnell *v.* Hallett, 235  
 Pinney *v.* Hunt, 622  
 Piper *v.* Piper, 276  
 Pitt *v.* Cholmondeley, 169, 510  
 Playford *v.* Playford, 549  
 Pledge *v.* Buss, 493  
 Plimpton *v.* Spiller, 574  
 Plumb *v.* Fluitt, 38  
 Plunket *v.* Lewis, 257  
     — *v.* Penson, 262  
 Pocock *v.* Att.-Gen., 118  
 Pole *v.* Fitzgerald, 455  
 Polini *v.* Gray, 746  
 Pollard *v.* Clayton, 528  
     — *v.* Greenville, 427  
 Polyblank *v.* Hawkins, 344  
 Pomfret *v.* Windsor, 315  
 Pontifex *v.* Midland Ry. Co., 748  
     — *v.* Severn, 509, 704  
 Poole's Case, *In re*, 266  
 Pooley *v.* Budd, 525  
     — *v.* Harradine, 489  
     — *v.* Quilter, 152, 474  
 Pope *v.* Curl, 577  
 Pope *v.* Pope, 106  
 Pope's Trusts, *In re*, 347  
 Portarlington *v.* Soulby, 555  
 Porter *v.* Baddeley, 163  
 Porter *v.* Lopes, 588  
 Postmaster - General, *Ex parte*,  
     271  
 Pothonier *v.* Dawson, 330  
 Potter *v.* Chambers, 743, 745  
     — *v.* Sanders, 35  
 Pottinger, *Ex parte*, 270  
 Powel *v.* Cleaver, 403  
 Powell *v.* Elliott, 546, 547  
     — *v.* Glover, 153  
     — *v.* Hellicar, 174  
     — *v.* Jewsbury, 667  
     — *v.* Knowler, 102, 467  
     — *v.* Powell, 431  
     — *v.* Price, 445  
     — *v.* Thomas, 44  
     — *v.* Williams, 685  
 Powys *v.* Blagrove, 568  
     — *v.* Mansfield, 250  
 Prendergast *v.* Devey, 491  
 Prescott, *Ex parte*, 513  
 Price *v.* Barker, 492  
     — *v.* Dyer, 544  
     — *v.* Edmunds, 491  
     — *v.* Jenkins, 84, 90  
     — *v.* Macaulay, 546  
     — *v.* North, 268  
 Pride *v.* Bubb, 347, 351  
 Primrose *v.* Bromley, 489  
 Prince Albert *v.* Strange, 570  
 Pringle *v.* Gloag, 335, 515  
 Printing and Numerical Company,  
     *In re*, 270  
 Probert *v.* Clifford, 289  
 Prole *v.* Soady, 536



- Prosser *v.* Edmonds, 102  
 ——— *v.* Rice, 37  
 Protheroe *v.* Forman, 559  
 Proudfoot *v.* Montefiore, 455  
 Proudley *v.* Fielder, 344, 353  
 Provident Permanent Building  
     Society *v.* Greenhill, 307  
 Prowse *v.* Abingdon, 293  
 Prudential Assurance Company  
     *v.* Knott, 558  
 ——— *v.* Thomas, 589  
 Pryce *v.* Bury, 324, 325  
 ——— *v.* Monmouth & Co., 744  
 Pullen *v.* Ready, 433  
 Pulsford, *In re*, 403  
 ——— *v.* Richards, 450, 452  
 Pulteney *v.* Darlington, 201, 208,  
     211  
 Pulvertoft *v.* Pulvertoft, 91  
 Pumfrey, *In re*, 84, 86  
 Purdew *v.* Jackson, 386, 387, 389  
 Pusey *v.* Desbouvrie, 436  
 ——— *v.* Pusey, 528  
 Pybus *v.* Smith, 360  
 Pyke, *Ex parte*, 70, 244, 248, 251  
 Pyke *v.* Northwood, 557  
 Pym *v.* Blackburn, 430  
 ——— *v.* Bowreman, 301  
 ——— *v.* Lockyer, 248, 256  
  
 QUARRIER *v.* Colston, 613  
 Queensberry (Duke of) *v.* Sheb-  
     beare, 578  
  
 RADCLIFFE, *In re*, 264  
 Raggett *v.* Findlater, 586  
 Rainsdon's Trusts, *In re*, 347  
 Ralph *v.* Carrick, 749  
 Ramsden *v.* Dyson, 44, 143  
 ——— *v.* Hurst, 547  
 ——— *v.* Jackson, 263  
 Ramuz *v.* Crowe, 425  
 Rand *v.* Cartwright, 301  
 Randall *v.* Errington, 473  
 Ranelagh *v.* Hayes, 486  
 Ransome *v.* Burgess, 410  
 Rawley *v.* Rawley, 515  
 Rawlins *v.* Wickham, 450, 452,  
     499  
 Rawson *v.* Samuel, 513, 514  
 Rawstone *v.* Parr, 441, 486  
  
 Raymond's Case, Lord, 408  
 Read *v.* Brookman, 422  
 Reddington *v.* Reddington, 129  
 Redman *v.* Redman, 465  
 Rede *v.* Oakes, 550  
 Reece *v.* Trye, 528  
 Reed *v.* Norris, 490  
 Rees *v.* Berrington, 591  
 Reg. *v.* Harington, 629  
 Rehden *v.* Wesley, 159  
 Reid *v.* Shergold, 427  
 Renals *v.* Cowlishaw, 561  
 Rennie *v.* Young, 143  
 Reynard *v.* Arnold, 87  
 ——— *v.* Spence, 231  
 Reynell *v.* Sprye, 101, 467, 549  
 Reynolds *v.* Godlee, 197, 198  
 Rhodes *v.* Jenkins, 753  
 Ribbans *v.* Crickett, 518  
 Rica Gold Washing Company, *In*  
     *re*, 661  
 Rice *v.* Rice, 24, 25, 140, 478  
 Rich *v.* Cockell, 223, 348  
 Richards & Co., *In re*, 270  
 ——— *v.* Delbridge, 80  
 ——— *v.* Lewis, 84  
 ——— *v.* Revitt, 562  
 Richardson *v.* Horton, 441  
 Richmond *v.* White, 283  
 Rickard *v.* Barrett, 290  
 Riddle *v.* Emmerson, 58  
 Rider *v.* Kidder, 127, 468  
 Ridges *v.* Morrison, 246  
 Ridgway *v.* Clare, 503  
 ——— *v.* Gray, 547  
 Ridley, *In re*, 361  
 Ridout *v.* Lewis, 372  
 Rigden *v.* Vallier, 33, 171  
 Ripley *v.* Waterwork, 192  
 Ripon *v.* Hobart, 569  
 Roach *v.* Trood, 480  
 Roberts *v.* Croft, 326  
 ——— *v.* Dixwell, 351  
 ——— *v.* Evans, 651  
 ——— *v.* Gordon, 209  
 ——— *v.* Roberts, 465, 468  
 Robin's Estate, *In re*, 229  
 Robinson *v.* Chadwick, 647, 698  
 ——— *v.* Gee, 287  
 ——— *v.* Geldard, 179, 293  
 ——— *v.* Litton, 568

- Robinson *v.* London Hospital (Governors of), 123, 200  
 ——— *v.* Pett, 151  
 ——— *v.* Preston, 134  
 ——— *v.* Robinson, 164, 205, 388  
 ——— *v.* Smith, 105  
 ——— *v.* Wheelwright, 365  
 Roch *v.* Callen, 246  
 Rodick *v.* Gandell, 97  
 Rodgers *v.* Jones, 216, 750  
 ——— *v.* Rodgers, 478  
 Rogers *v.* Challis, 581  
 Rolls *v.* Pearce, 175  
 Rolt *v.* Hopkinson, 315  
 ——— *v.* Somerville, 567  
 Rook *v.* Worth, 209  
 Rooper *v.* Harrison, 312  
 Roper *v.* Roper, 271  
 Roper's Trusts, *In re*, 411  
 Rose *v.* Sharrod, 365  
 Rossiter *v.* Miller, 550  
 Ross's Trust, *In re*, 364  
 Rowbotham *v.* Dunnett, 110  
 Rowe *v.* Gray, 588  
 ——— *v.* Rowe, 243  
 ——— *v.* Wood, 308  
 Rowlands *v.* Evans, 500  
 Rowley *v.* Unwin, 353  
 Rudge *v.* Weedon, 347  
 Rusden *v.* Pope, 592  
 Rushton *v.* Tobin, 685  
 Russ *v.* Mills, 305, 568  
 Russel *v.* Davy, 440  
 ——— *v.* Hankins, 243  
 ——— *v.* Russel, 324, 325  
 Russell *v.* Dickson, 246  
 ——— *v.* St. Aubyn, 253  
 Ryall *v.* Rowles, 99  
 ——— *v.* Ryall, 125  
 Ryan *v.* Mackmath, 614
- SAGITARY *v.* Hide, 398  
 Saffron Walden Building Society *v.* Rayner, 41  
 Sainter *v.* Ferguson, 341  
 Sale *v.* Moore, 106  
 Salisbury *v.* Bagott, 146  
 Salmon *v.* Gibbs, 473  
 Salusbury *v.* Denton, 112  
 Salwey *v.* Salwey, 150, 395
- Samuel *v.* Howarth, 491  
 Sanderson, *In re*, 750  
 Sandon *v.* Hooper, 311  
 Saner *v.* Bilton, 745  
 Sanger *v.* Sanger, 365, 366  
 Sarth *v.* Blanfrey, 427  
 Saunders *v.* Dehew, 28, 84  
 ——— *v.* Dunman, 336  
 ——— *v.* Smith, 573  
 Savage *v.* Foster, 44, 168, 354  
 Savery *v.* King, 469  
 Saxton *v.* Bartley, 588  
 Sayer *v.* Sayer, 121  
 Scales *v.* Collins, 299  
 Scawen *v.* Blunt, 344  
 Scawin *v.* Scawin, 129  
 Scholefield *v.* Templer, 452  
 Schoole *v.* Sall, 557  
 Schroder *v.* Schroder, 224  
 Schroeder *v.* Cleugh, 711  
 Scotland, Life Association of, *v.* Siddal, 376  
 Scott *v.* Beecher, 275  
 ——— *v.* Hanson, 546  
 ——— *v.* Jones, 267  
 ——— *v.* Rayment, 496, 581  
 ——— *v.* Spashett, 376, 378, 397  
 ——— *v.* Tyler, 428, 466  
 Scriven *v.* Tapley, 392  
 Scudamore *v.* Scudamore, 191  
 Scully *v.* Lord Macdonald, 741  
 Seagood *v.* Meale, 534  
 Seaman *v.* Vawdrey, 547  
 Searle *v.* Law, 71  
 Sedgwick *v.* Daniell, 504  
 Seely *v.* Jago, 204, 205  
 Selby *v.* Pomfret, 317  
 ——— *v.* Selby, 285  
 Seligmann *v.* De Boutillier, 497  
 Sells *v.* Sells, 443  
 Sergeson *v.* Sealey, 406  
 Seton *v.* Slade, 548  
 Seymore *v.* Tresilian, 373  
 Shackleton *v.* Sutcliffe, 546  
 Sharples *v.* Adams, 165, 318  
 Sharp, *Re*, 352  
 ——— *v.* Lush, 724  
 Sharpnell *v.* Blake, 303  
 Sharrod *v.* N. W. Railway Co., 9  
 Shattock *v.* Shattock, 354, 355  
 Shaw *v.* Earl of Jersey, 734

- Shaw *v.* Fisher, 526  
 ——— *v.* Neale, 315, 335  
 Sheddon *v.* Goodrich, 224  
 Sheen, *Ex parte*, 503  
 Sheffield, *Ex parte*, 103  
 ——— *v.* Duchess of Bucking-  
     ham, 617  
 ——— *v.* Eden, 309  
 ——— Waterworks *v.* Yeomans,  
     608, 609  
 Shelley's Case, 61, 63  
 Shelley *v.* Westbrooke, 405  
 Shepherd, *In re*, 348, 359  
 ——— *v.* Beane, 655  
 ——— *v.* Titley, 314  
 Sherwen *v.* Selkirk, 269  
 Ship "Constantia," 745  
 Shirley *v.* Stratton, 549  
 Shirreff *v.* Hastings, 263  
 Shovelton *v.* Shovelton, 105  
 Shubrook, *Ex parte*, 334  
 Shuttleworth *v.* Greaves, 226  
 ——— *v.* Laycock, 316  
 Sidmouth *v.* Sidmouth, 126,  
     129  
 Siddons *v.* Lawrence, 743  
 Siegert *v.* Findlater, 580  
 Siggers *v.* Evans, 94  
 Simmins *v.* Shirley, 308  
 Simmons *v.* Simmons, 347  
 Simpson *v.* Denny, 650  
 ——— *v.* Howden (Lord), 559,  
     615  
 ——— *v.* Lamb, 103  
 Simson *v.* Ingham, 518  
 ——— *v.* Jones, 398, 409  
 Singer Manufacturing Company  
     *v.* Loog, 685  
 Sisson *v.* Giles, 204  
 Skinner *v.* M'Douall, 531  
 Slade *v.* Barlow, 586  
 Slater's Trusts, *In re*, 476,  
     631  
 Sleigh *v.* Thorington, 396  
 Sleigh's Case, 520  
 Slim *v.* Croucher, 451, 479,  
     565  
 Slingsby *v.* Boulton, 594  
 Slocombe *v.* Glubb, 400  
 Sloman *v.* Walter, 337  
 Smart *v.* Hunt, 303  
 Smith, *Ex parte*, 335  
 ——— *v.* Ashton, 427  
 ——— *v.* Bromley, 468  
 ——— *v.* Bruning, 465  
 ——— *v.* Casen, 176  
 ——— *v.* Claxton, 192, 195, 198,  
     199  
 ——— *v.* Clay, 45  
 ——— *v.* Dobbin, 632, 641  
 ——— *v.* Garland, 84  
 ——— *v.* Hammond, 593  
 ——— *v.* Hill, 302  
 ——— *v.* Hudson, 536  
 ——— *v.* Jeyes, 499  
 ——— *v.* Kay, 470  
 ——— *v.* Leveaux, 507  
 ——— *v.* Lyne, 228  
 ——— *v.* Mules, 500  
 ——— *v.* Richardson, 652  
 ——— *v.* Smith, 407, 408  
 ——— *v.* Wheatcroft, 543  
 Smith's Case, 307  
 Smith, Fleming, & Co., *In re*, 520  
 ——— *In the goods of*, 350  
 Sneed *v.* Sneed, 427  
 Sneesby *v.* Thorne, 550  
 Snell, *In re*, 334  
 Snellgrove *v.* Baily, 173, 175  
 Snelson *v.* Corbet, 374  
 Soames *v.* Edge, 582  
 Soar *v.* Foster, 127  
 Sobey *v.* Sobey, 624  
 Solomon *v.* Solomon, 278  
 Somerset *v.* Cookson, 528  
 Somerville *v.* Mackay, 496  
 Sopwith *v.* Maugham, 231  
 South *v.* Bloxam, 287  
 South-Eastern Railway Company  
     *v.* Martin, 509  
 South Wales Railway Company *v.*  
     Wythes, 523  
 South Wales Steamship Company,  
     *In re*, 682  
 Sowden *v.* Sowden, 235  
 Spalding *v.* Thompson, 331, 332  
 Sparrow *v.* Josselyn, 179  
 ——— *v.* Paris, 341  
 Spencer *v.* Clarke, 24, 40, 328  
 ———, Earl *v.* Peek, 604  
 ——— *v.* Pearson, 314  
 ——— *v.* Topham, 41, 471

- Spence, *Re*, 404  
 Spicer v. Spicer, 395  
 Spirett v. Willows, 81, 82, 397  
 Spratt's Patent v. Ward & Com-  
     pany, 685  
 Sproule v. Prior, 290  
 Sprunt v. Pugh, 716  
 Spuckman v. Evans, 457  
 Spurgeon v. Collier, 86, 164  
 Spurr v. Hall, 666  
 Squib v. Wyn, 95  
 Stackhouse v. Jersey (Countess),  
     26  
 Stackpoole v. Stackpoole, 90  
 Stafford v. Fiddon, 167  
 Stahlschmidt v. Walford, 687  
 Standard Discount Company v.  
     Otard de la Grange, 754  
 Stanger-Leathes v. Stanger-  
     Leathes, 745  
 Stanhope v. Earl Verney, 601  
     — Silkstone Collieries, *In re*,  
     712, 720  
 Staniland v. Willott, 170  
 Stanley v. Stanley, 168, 352  
 Stansfield v. Hobson, 304  
 Stanton v. Hall, 387  
 Staples v. Young, 745  
 Stead v. Hardaker, 280  
     — v. Mellor, 109  
     — v. Nelson, 350  
 Stead's Mort. Estates, *In re*,  
     320  
 Stebbing v. Walkey, 444  
 Steed v. Preece, 195, 406, 417  
 Steedman v. Poole, 364  
 Steele v. Hutchings, 745  
 Stephens, *Ex parte*, 516  
     — v. Stephens, 226  
 Stephenson v. Chiswell, 503  
     — v. Dowson, 179  
 Stevens v. Bagwell, 101  
 Steward v. Blakeway, 502  
 Stewart, *In re*, 270  
     — v. Gladstone, 683  
 St. George v. Wake, 400  
 St. John v. St. John, 468, 614  
     — v. Wareham, 298  
 St. Nazaire Land Company, *In re*,  
     751  
 Stocken v. Stocken, 257, 410  
 Stockton Iron Furnace Company,  
     *In re*, 305, 321  
 Stokes v. Grant, 671  
 Stone v. Lidderdale, 101  
 Stonehewer v. Thomson, 301  
 Storey v. Waddle, 648  
 Storr v. Corporation of Maidstone,  
     745  
 Stowell v. Robinson, 548  
 Strachan, *In re*, 511  
 Strange v. Fooks, 45, 493  
 Stratford v. Powell, 231  
 Strathmore v. Bowes, 399, 401  
 Stratton v. Best, 228  
 Streatfield v. Streatfield, 229, 231  
 Street v. Rigby, 497, 600  
 Strickland v. Aldridge, 110  
     — v. Strickland, 280  
 Stuart v. Kirkwall, 357  
 Stubbs' Estate, *In re*, 264  
 Sturge v. Starr, 35  
     — v. Sturge, 436  
     — v. Midland Ry. Co., 524  
 Sturgis v. Champneys, 43, 375,  
     382  
     — v. Corp, 350  
 Suche & Company, *In re*, 270  
 Sugg v. Silber, 685  
 Suggitt's Trust, *In re*, 396, 397  
 Suisse v. Lowther, 249  
 Sullivan v. Jacob, 550  
 Sumner v. Powell, 440, 486  
 Surcombe v. Pinniger, 535  
 S. & V. W. Co. v. Quick, 677  
 Swain v. Wall, 490  
 Swainson v. Swainson, 275  
 Sweetapple v. Bindon, 65, 191  
 Swinfen v. Swinfen, 150  
 TABOR v. Brooks, 151  
 Taff Vale Rail. Co. v. Nixon, 509  
 Talbot v. Frere, 283, 332  
     — v. Hamilton, 539  
     — v. Shrewsbury, 241, 242  
     — v. Staniforth, 477  
 Tapley v. Kent, 171  
 Tarsey's Trusts, *Re*, 349  
 Tasmanian Ry. Co. v. Clark, 674  
 Tassell v. Smith, 317  
 Tate v. Gilbert, 171, 175  
     — v. Leithead, 176

- Taunton *v.* Morris, 382  
 Taylor *v.* Batter, 677  
     — *v.* Burgess, 489  
     — *v.* Brown, 549  
     — *v.* Coenen, 82  
     — *v.* Haygarth, 131  
 Taylor *v.* Meads, 351  
     — *v.* Plumer, 236  
     — *v.* Pugh, 400, 401  
     — *Re*, 404  
     — *v.* Salmon, 474  
     — *v.* Taylor (3 De G. M. & G. 190), 200  
     — *v.* Taylor (28 L. T. 189), 155  
 Teasdale *v.* Braithwaite, 86  
     — *v.* Teasdale, 478  
 Tenant *v.* Rawlings, 752  
 Theed *v.* Debenham, 571  
 Thetford School Case, *The*, 121  
 Thomas *v.* Bennet, 372  
     — *v.* Britnel, 268  
     — *v.* Dering, 547  
     — *v.* Elsom, 751  
     — *v.* Tyler, 599  
 Thompson *v.* Bennet, 206  
     — *v.* Bowyer, 304  
     — *v.* Finch, 157  
     — *v.* Fisher, 67  
     — *v.* Griffin, 410  
     — *v.* Hudson, 518  
     — *v.* Simpson, 445  
     — *v.* Stanhope, 577  
     — *v.* Whitmore, 443  
 Thomson *v.* Thomson, 522  
 Thorley's Cattle Food Company  
     *v.* Massam, 558  
 Thornbrough *v.* Baker, 298  
 Thorndyke *v.* Hunt, 25, 146, 164  
 Thorneycroft *v.* Crockett, 287  
 Thorn *v.* Smith, 635  
 Thornton *v.* Hawley, 184  
 Threlfall *v.* Lunt, 615  
 Thynne *v.* Glengall, 253, 255  
 Tibbets *v.* Tibbets, 231  
 Tidd *v.* Lister, 287, 380  
 Tierney *v.* Wood, 75  
 Tildesley *v.* Clarkson, 550  
 Tildesley *v.* Harper, 660, 672  
 Tipping *v.* Tipping, 289, 374  
 Tipton Green Colliery Company  
     *v.* Tipton Moat Coll. Co., 307  
 Todd *v.* Wilson, 511  
 Tollet *v.* Tollet, 427  
 Tombs *v.* Roch, 281, 291  
 Tombs *v.* Elers, 408  
 Tomkins *v.* Colthurst, 282, 290  
 Tomline *v.* The Queen, 677  
 Tomson *v.* Judge, 470  
 Tönnies, *In re*, 90  
 Toulmin *v.* Steere, 312  
 Toussain *v.* Martinnant, 487  
 Tower *v.* Rouse, 273  
 Townend *v.* Townend, 153, 168  
 Townley *v.* Bedwell, 188  
 Townley *v.* Sherborne, 155, 156  
 Townsend *v.* Westacott, 83  
 Townshend *v.* Mostyn, 275  
     — Peerage Case, 605  
     — *v.* Stangroom, 440, 543  
     — *v.* Townshend, 266  
     — *v.* Windham, 289, 371  
 Trafford *v.* Boehm, 209  
 Travis *v.* Milne, 177  
 Treleaven *v.* Bray, 656  
 Tremain's Case, 405  
 Trench *v.* Harrison, 236  
 Tress *v.* Savage, 550  
 Trestrail *v.* Mason, 277  
 Trethewy *v.* Helyar, 280  
 Trevor *v.* Trevor, 64  
 Trimmer *v.* Danby, 174  
 Triquet *v.* Thornton, 205  
 Trowell *v.* Shenton, 86, 535, 771  
 Tucker *v.* Burrow, 427  
 Tudor *v.* Anson, 427  
 Tuer *v.* Turner, 208, 385  
 Tufton *v.* Harding, 594  
 Tullett *v.* Armstrong, 347, 360,  
     361  
 Tumbridge *v.* Care, 128  
 Turnbull *v.* Janson, 749  
 Turner, *Re*, 263  
     — *v.* Corney, 149  
     — *v.* Harvey, 453  
     — *v.* Hednesford Gas Com-  
         pany, 653  
     — *v.* Letts, 335  
     — *v.* Marriott, 141  
     — *v.* Morgan, 587  
 Turquand *v.* Fearon, 650  
 Turton *v.* Benson, 99  
 Tussaud *v.* Tussaud, 252

- Tweedale *v.* Tweedale, 111, 317  
 Twiss *v.* Massey, 503  
 Twycross *v.* Grant, 657  
 Tyler *v.* Lake, 394  
 ——— *v.* Yates, 556  
 Tyrrell *v.* Bank of London, 471,  
     474  
 ——— *v.* Hope, 349  
  
 UNDERHILL *v.* Horwood, 441  
 Ungley *v.* Ungley, 535  
 United States of America *v.*  
     M'Rae, 599  
 Usil *v.* Brearley, 746  
 Usticke *v.* Peters, 227  
  
 VAN *v.* Corpe, 544  
 Vanderzee *v.* Willis, 329  
 Vane *v.* Barnard, 567  
 ——— *v.* Vane, 416, 452, 627,  
     651  
 Vaughan *v.* Buck, 380  
 ——— *v.* Halliday, 520  
 ——— *v.* Vanderstegen, 282,  
     354, 355  
 ——— *v.* Welsh, 557  
 Veal *v.* Veal, 176  
 Verity *v.* Wylde, 335  
 Verney *v.* Carding, 166  
 Vernon *v.* Vernon, 406  
 Verrall *v.* Cathcart, 588  
 Vickers *v.* Pound, 180  
 Villiers *v.* Beaumont, 612  
 Vigers *v.* Pike, 753  
 Vulliamy *v.* Noble, 516  
  
 W—— *v.* B——, 605  
 Waddell *v.* Blockley, 744  
 Wagstaff *v.* Smith, 349, 350  
 Wake *v.* Wake, 230  
 Wakelee *v.* Davis, 661  
 Walcot *v.* Walker, 575  
 Waldron *v.* Sloper, 327  
 Walford *v.* Gray, 536  
 Walker *v.* Jeffreys, 548  
 ——— *v.* Meager, 271  
 ——— *v.* Micklethwaite, 558  
 ——— *v.* Preswick, 139  
 ——— *v.* Symonds, 157, 159,  
     454  
 Wall *v.* Colshed, 197  
  
 Wallace *v.* Auldjo, 392, 394  
 Wallis *v.* Duke of Portland, 102,  
     598  
 Wallwyn *v.* Lee, 31  
 Walmsley *v.* Child, 422, 423  
 Walsall Overseers *v.* London and  
     North-Western Railway Com-  
     pany, 626  
 Walsham *v.* Stanton, 474  
 Walsh *v.* Wason, 397  
 Walter *v.* Selfe, 570  
 Walwyn *v.* Coutts, 91  
 Ward *v.* Arch, 184  
 Ward *v.* Turner, 170, 173  
 Warden *v.* Jones, 86, 534, 535  
 Ware *v.* Egmont, 40  
 ——— *v.* Horwood, 559  
 ——— *v.* Polhill, 406, 407  
 Waring, *Ex parte*, 520  
 Warneford *v.* Thomson, 428  
 Warren *v.* Rudall, 217  
 Warriner *v.* Rogers, 80  
 Waterer *v.* Waterer, 502  
 Waters *v.* Taylor, 499, 500  
 Wathen *v.* Smith, 244  
 Watney *v.* Wells, 500  
 Watson *v.* Allcock, 493  
 ——— *v.* Knight, 94  
 ——— *v.* Marston, 550  
 ——— *v.* Rodwell, 169, 511, 679,  
     750  
 ——— *v.* Rose, 142  
 ——— *v.* Watson, 256  
 Watt, *In re*, 270  
 ——— *v.* Barnett, 697  
 ——— *v.* Watt, 427  
 Watts *v.* Bullas, 427  
 ——— *v.* Symes, 317  
 Way *v.* East, 111  
 Way's Settlement, *Re*, 79  
 Webb *v.* Earl of Shaftesbury, 152  
 ——— *v.* Hewitt, 491, 493  
 ——— *v.* Rorke, 309  
 Webster *v.* Petre, 490  
 Wedderburn's Trusts, *In re*, 162  
 Wedderburn *v.* Wedderburn, 153,  
     501  
 Wedgwood *v.* Adams, 550  
 Weeding *v.* Weeding, 189, 190  
 Welby *v.* Welby, 226  
 Weldon *v.* Dicks, 577

- Welles v. Middleton, 471, 472  
 Wellesley v. Beaufort, 402, 404, 405  
 ——— v. Mornington, 480  
 Wells v. Mitcham Gas Light Company, 744  
 Welpby v. Bull, 630  
 West v. Erisey, 442  
 Westby v. Westby, 436  
 Western Bank of Scotland v. Addie, 452  
 West of England and South Wales Bank, *Ex parte* Hatcher, 369  
 Westley v. Clarke, 158  
 Westman v. Aktiebolaget, 637  
 Westminster (Duchess of) Silver Lead Ore Co., *In re*, 744  
 Wharton, *Re*, 417  
 Wheeler v. Caryl, 389, 398  
 ——— v. Smith, 126  
 ——— v. Warner, 111  
 Wheldale v. Partridge, 201, 210, 212  
 Wherley, *In re*, 319  
 Whistler v. Webster, 215, 218, 220  
 Whitaker v. Thurston, 736  
 Whitbread v. Jordan, 40  
 ——— v. Smith, 323  
 Whitechurch v. Bevis, 532  
 White v. Nutts, 430  
 Whiteman v. Hawkins, 319  
 Whitfield v. Hales, 405  
 ——— v. Fausset, 420, 424  
 Whiting v. Burke, 488  
 Whitting, *In re*, 97  
 Whitton v. Russell, 431  
 Whitworth v. Gaugain, 314  
 Whyte v. Whyte, 247  
 Wicks v. Hunt, 581  
 Widgery v. Tepper, 390, 707  
 Wigg, *Ex parte*, 233  
 ——— v. Wigg, 161, 754  
 Wilcocks v. Wilcocks, 233  
 Wildman v. Wildman, 344  
 Wild's Case, 65  
 Wilkes v. Holmes, 427  
 Wilkin v. Aikin, 576  
 ——— v. Hogg, 159  
 Wilkinson v. Joberns, 588  
 ——— v. Nelson, 442  
 Wilkinson v. Parry, 168  
 ——— v. Wilkinson, 68  
 Willan v. Willan, 433, 435  
 Willcock v. Terrell, 101  
 Willett v. Blanford, 501  
 Williams, *Ex parte*, 305, 321  
 Williams, *In re*, 120, 263  
 ——— v. Bull, 611  
 ——— v. Davies, 575  
 ——— v. Griffith, 717  
 ——— v. Jordon, 550  
 ——— v. Kershaw, 123, 293  
 ——— v. Lambe, 33  
 ——— v. Nixon, 157  
 ——— v. Owens, 298, 494  
 ——— v. Williams, 128, 129  
 Willis v. Kymer, 113  
 Willisford v. Watson, 497  
 Willoughby v. Middleton, 229  
 Willoughby v. Willoughby, 601  
 Wills v. Stradling, 533  
 ——— v. Slade, 586  
 Wilmot v. Pike, 29, 313, 315  
 Wilson, *Ex parte*, 305  
 Wilson v. Church, 626, 652  
 ——— v. Lloyd, 487  
 ——— v. Piggott, 481  
 ——— v. Townshend, 229  
 ——— v. Williams, 547  
 Windham v. Jennings, 316  
 Wingrove v. Thompson, 651, 657  
 Winn v. Bull, 550  
 Winterfield v. Bradnum, 746  
 Wintour v. Clifton, 226  
 Withrington v. Bankes, 310, 658  
 Withers v. Parker, 645  
 Withers v. Withers, 58  
 Withy v. Cottle, 548  
 Witt, *In re*, 334  
 Witt v. Parker, 645  
 Wollaston v. Berkeley, 396  
 ——— v. King, 220, 412  
 ——— v. Tribe, 480  
 Wolverhampton R. v. L. & N. W. Railway, 564  
 Wood v. Bryant, 181, 257  
 ——— v. Ordish, 279, 280  
 ——— v. Rowcliffe, 528  
 ——— v. Scarth, 541  
 ——— v. Sutcliffe, 569  
 Woodmeston v. Walker, 364

- Woods *v.* Hyde, 190  
 ——— *v.* M'Innes, 637  
 Woolleridge *v.* Norris, 486  
 Woollam *v.* Hearn, 543  
 Woolridge *v.* Woolridge, 221  
 Woolstencroft *v.* Woolstencroft,  
     277, 278  
 Wormsley's Estate, *In re*, 276  
 Worrall *v.* Harford, 159  
 ——— *v.* Jacob, 433  
 Wortham *v.* Pemberton, 384, 407  
 Worthington *v.* Morgan, 40  
 Wortley *v.* Birkhead, 311  
 Wray *v.* Hutchinson, 499  
 Wray *v.* Steele, 125  
 Wray's Trusts, *Re*, 398  
 Wrigley *v.* Swainson, 395  
 Wright, *Ex parte*, 324  
 ——— *v.* Bell, 527  
 ——— *v.* Howard, 545  
 ——— *v.* Hunter, 504  
 ——— *v.* Lambert, 163  
 ——— *v.* Laing, 518  
 ——— *v.* Maidstone, 426  
 ——— *v.* Morley, 380  
 ——— *v.* Redgrave, 553, 645  
 ——— *v.* Rose, 186  
 ——— *v.* Simpson, 486, 491  
 ——— *v.* Snowe, 168  
 Wright *v.* Swainson, 400  
 ——— *v.* Vanderplank, 45, 469  
 ——— *v.* Ward, 592, 593  
 ——— *v.* Wright, 197, 352, 363  
 Wyke *v.* Rogers, 491  
 Wylie *v.* Wylie, 502  
 Wyllie *v.* Pollen, 314  
 Wymer *v.* Dodd, 638  
 Wynstanley *v.* Lee, 570, 571  
 Wythe *v.* Henniker, 291  
 Wythes *v.* Labouchere, 484  
 ——— *v.* Lee, 141  
 YALLOP, *Ex parte*, 126  
 Yeatman *v.* Yeatman, 177  
 Yem *v.* Edwards, 142  
 Yetts *v.* Foster, 737  
 Yglesias, *In re*, 520  
 Yockney *v.* Hansard, 246  
 York, Mayor of, *v.* Pilkington,  
     538, 609  
 Yorkshire Banking Company *v.*  
     Beatson, 666  
 York Union Banking Company *v.*  
     Astley, 325  
 Young *v.* Brassey, 636  
 ——— *v.* English, 335, 518  
 ——— *v.* Kitchen, 654  
 Yoworth *v.* Dewell, 107



## ADDENDA ET CORRIGENDA.

---

- P. 39, footnote (f)—*Allen v. Seckham* is now reported in 11 Ch. Div. 790.
- P. 153, footnote (j)—Add *Emma Silver Mining Co. v. Lewis*, 4 C. P. Div. 396.
- P. 219, 3d line from top, for “imported” read “appointed.”
- P. 269, footnote (g)—*Sherwen v. Selkirk* is now reported in 12 Ch. Div. 68.
- P. 270, footnote (j)—Add *In re Bridgewater Engineering Co.*, 12 Ch. Div. 181.
- P. 283, footnote (h)—*Richmond v. White* reversed on appeal, and reported in 12 Ch. Div. 361.
- P. 292, footnote (y)—Add *Bray v. Stevens*, 12 Ch. Div. 162; *Bailey v. Bailey*, 12 Ch. Div. 268.
- P. 334, footnote (c)—*Newington Local Board v. Eldridge* is now reported in 12 Ch. Div. 349.
- P. 335, footnote (e)—Add *Brown v. Trotman*, 12 Ch. Div. 880.
- P. 335, footnote (g)—Add *Lawrence v. Fletcher*, 12 Ch. Div. 858.
- P. 335, footnote (i)—Add *Hamer v. Giles*, 11 Ch. Div. 942.
- P. 355, footnote (j)—Add *Godfrey v. Harben*, W. N. 1879, p. 175.
- P. 359, footnote (w)—*Ex parte Jones, In re Grissell*, is now reported in 12 Ch. Div. 484.
- P. 370, footnote (w)—Add *De Greuchy v. Wills*, 4 C. P. Div. 362; *Collett v. Dickenson*, 4 Exch. Div. 285.
- P. 376, footnote (u)—Add *Robinson v. Robinson*, 12 Ch. Div. 188.
- P. 382, footnote (g)—*Taunton v. Morris*, as affirmed on appeal, is now reported in 11 Ch. Div. 779.
- P. 390, footnote (a)—Add *Robinson v. Robinson*, 12 Ch. Div. 188.
- P. 412, footnote (a)—Add *Lillingston v. Pares*, 12 Ch. Div. 333; *In re Bligh*, 12 Ch. Div. 364.
- P. 515, footnote (o)—Add *Hamer v. Giles*, 11 Ch. Div. 942.
- P. 535, footnote (b)—Add *Dashwood v. Jermyn*, 12 Ch. Div. 776.
- P. 629.—Add *Cobbold v. Pryke*, 4 Exch. Div. 315.
- P. 637.—Add *Ex parte M'Phail*, 12 Ch. Div. 632; *Tottenham v. Barry*, 12 Ch. Div. 797.

- P. 657.—*Boynton v. Boynton*, on appeal, reported in 4 App. Ca. 733.
- P. 659.—Add *Rutter v. Tregent*, 12 Ch. Div. 758; *Williamson v. L. & N. W. Rail. Co.*, 12 Ch. Div. 787.
- P. 696.—*In re Orrell Colliery* is now reported in 12 Ch. Div. 681.
- P. 718.—Add *Hall v. Ley*, 12 Ch. Div. 795.
- P. 723.—Add *Polini v. Gray*, *Sturla v. Freccia*, 12 Ch. Div. 438; *Wilson v. Church* (No. 2), 12 Ch. Div. 454.
- P. 739-740.—Add *Brocklebank v. East London R. Co.*, 12 Ch. Div. 839.
- P. 743.—*Galatti v. Wakefield*, sub nomine *Gatti v. Webster*, is now reported in 12 Ch. Div. 771; *Potter v. Chambers*, on appeal, is reported in 4 C. P. Div. 457; and add *Neale v. Clarke*, 4 Exch. Div. 286; *Turner v. Heyland*, 4 C. P. Div. 432.
- P. 744.—Add *Lee Conservancy Board v. Button*, 12 Ch. Div. 383.
- P. 744-745.—Add *Aitcheson v. Lohre*, 4 App. Ca. 755.
- P. 745.—*Massey v. Allen* is now reported in 12 Ch. Div. 807. Add *Chatfield v. Sedgwick*, 4 C. P. Div. 459.
- P. 751-752.—Add *Rhodes v. Liverpool C. I. Co.*, 4 C. P. Div. 425.
- P. 753-754.—Add *Pheysey v. Pheysey*, 12 Ch. Div. 305.
- P. 754.—Add *Dollman v. Jones*, 12 Ch. Div. 553.
- P. 765.—Add *Lee v. Nuttall*, 12 Ch. Div. 61.

# THE PRINCIPLES OF EQUITY.

---

## PART I.—INTRODUCTORY.

---

### CHAPTER I.

#### THE JURISDICTION IN EQUITY.

IN treating of Equity, it is essential to distinguish the various senses in which that word is used. In its most general sense, we are accustomed to call that equity which in the transactions of mankind is founded in natural justice, or in honesty and right, and which properly arises *ex æquo et bono*. But it would be a great mistake to suppose that equity, as administered in the courts, embraces a jurisdiction so wide and various as the principles of natural justice. There are, on the contrary, many matters of natural justice which the courts leave wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness. A large portion, therefore, of natural equity, in its widest sense, cannot be, at least, is not, judicially enforced, but must be, or,

Nature and  
character of  
the jurisdic-  
tion in equity.

at least, is in fact, left to the conscience of private individuals (a).

Definition of equity,—by reference to its province or extent, and not its content.

Are we then to infer that the equity of the Court of Chancery represents the enforceable residue of natural equity, or, to put the matter more accurately, the whole of that portion of natural equity which may be, and which, in fact, is, enforced by legal sanctions, as administered by the equity tribunals? Were we to arrive at that conclusion, we should not be far wrong, bearing in mind, however, not to ignore the claims of the common law and the statute law. The customary use of the term common law, it is true, contradistinguishes it from equity strictly so called; nevertheless, the common law is as much founded on natural justice and good conscience as equity is; and if the common law has, until recently, fallen short of equity in its operation, its failure is to be attributed to defects in the *mode of administering* its principles rather than to any inherent weakness of or deficiency in the principles themselves. And, again, the enactments of the legislature (b) embody and give legal sanction to many principles of natural equity which, though capable of being administered by the courts, had been omitted to be recognised as such,—an omission arising probably from the tendency of all institutions to assume a defined and stereotypic form which refuses to receive further accessions, or to admit of alterations, even though coming from a cognate source. Having thus mapped out the whole area of what is termed natural justice, and so having seen that a large portion of it cannot be, or, in fact, is not, enforced at all by any civil tribunals, and that another large portion of it is enforced in the Common Law divisions, and a third part of it is enforced in the Com-

---

(a) *Green v. Lyon*, 21 W. R. 830.

(b) *Maine's Ancient Law*, 29.

mon Law and in the Equity divisions indifferently, by virtue of legislative enactments,—we are in a position to indicate, approximately, the province of equity strictly and properly so called. For, putting aside all that part of natural equity that is sanctioned and enforced by or by virtue of legislative enactments, equity may then be defined as being that portion of natural justice which, though of such a nature as properly to admit of being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the Common Law divisions, and which the Chancery division, or Court of Chancery, for reasons of its own, enforced. In short, the whole distinction between equity and law may be said to be a matter not so much of substance or of principle, as of form and history. The distinction, nevertheless, is a broad and permanent one, and has not been materially affected by the recent changes in the Supreme Judicature.

Before proceeding further, the student must endeavour to understand, with their proper limitations, the vague and inaccurate definitions or rather descriptions of equity, with which the text writers (chiefly the earlier ones) abound. Thus, one writer says that it is the duty of equity “to correct or mitigate the rigour, and what, in a proper sense, may be termed the injustice, of the common law.” Another holds that “equity is a judicial interpretation of laws, which, pre-supposing the legislature to have intended what is just and right, pursues and effectuates that intention.” Again, Lord Bacon lays it down, “*Habeant similiter Curiae Prætoriae potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis.*” And on the solemn occasion of his accepting the office of Chancellor, he said that Chancery was ordained to supply the law, not to subvert the law.

The older definitions of equity stated.

All these definitions of equity are good (at least as The older.

definitions  
of equity  
explained.

descriptions of equity), so far as they go. In the early history of English equity jurisprudence, there was probably much to justify them. The courts of equity were, it is probable, not then bounded in all cases by definite rules, but acted on principles of good conscience and natural justice, without much restraint of any sort. In fact, it is not easy to see how the courts of equity could do otherwise, in those early times when no definite rules had as yet been made or settled; and if the early Chancellors had not assumed to themselves (as representing the Sovereign and fountain of justice) the necessary powers, the English equity system would (and, in fact, could) never have acquired its present dignity and influence for good, or even have come into existence at all.

Equity in  
modern times,  
—character of:  
1. Courts of  
equity bound  
by settled rules  
and precedents.

But however indefinite may have been the functions of equity in its origin, there can be no doubt that the definitions or descriptions cited above do not express the extent or character of equity at the present day. They would, in fact, mislead as definitions, and be inaccurate as descriptions, of modern equity. For a court of equity is now bound by settled rules as completely as a court of common law. "There are certain principles on which courts of equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of common law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus enlarge the operation of those principles, but the principles are as fixed and certain as the principles on which the courts of common law proceed" (c). Again, Blackstone says, "The system of our courts of equity is a laboured

connected system, governed by established rules, and bound down by precedents from which they do not depart" (d). Again, it is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound by, and equally profess to interpret laws according to, the true intent of the legislature. There is not a single rule of interpreting laws that is not equally used by the judges in both the common law and the equity divisions; in fact, so far as the interpretation of laws is a question merely of construing enactments of the legislature, the construction in all the divisions is necessarily the same. Each division endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single letter (e). In all the divisions, the distinction taken in Mr. Austin's Jurisprudence, between the *ratio legis* (i.e., the principle of a statute) and the *ratio decidendi* (i.e., the principle of a decided case), is strictly observed and acted upon, that is to say, both in the common law and in the equity divisions, the *ratio decidendi* alone is considered of weight in interpreting and in applying decided cases; and in all the divisions equally, if the words of the statute are clear, they alone are regarded, and the *ratio legis* receives no weight at all, but is considered (for whatever weight it has), together with other *indicia* of interpretation, if (and only if) the words of the statute in themselves are not clear (f). And, in fact, to indicate in a few words the distinction between modern equity and common law, it may be said, in the words again of Blackstone, that "the systems of jurisprudence in our courts, both of law and of equity, are *now* equally artificial systems, founded on the same principles of justice

2. Modes of interpreting laws the same in equity as at law.

---

(d) 3 Bl. 432.

(e) 3 Bl. 431.

(f) *Heydon's case*, 3 Rep. 7; Dwarries on Statutes, 2d ed., 563.

and positive law; but varied by different usages in the *forms or modes of their proceedings*" (g); and (it may be added) that since the Judicature Acts, 1873-76, the forms and modes of their proceedings even are hardly different, excepting so far as the diversities of the subject-matters, and of the relief adapted thereto, involve or carry with them a greater or less diversity of form or of procedure.

Having thus briefly indicated the nature and the province of equity, it remains to trace the origin of the distinction in England between common law and equity,—a distinction which is not without its parallel in the systems of jurisprudence in other countries also.

Origin of the  
jurisdiction in  
equity.

It is a well-known fact that, during the Anglo-Saxon and early Norman periods of English history, the principles of the civil law were familiar to the clergy, the great repositories of learning in early times; and that the clergy being in those days the expounders and administrators of the law, imported into their decisions or expositions of it, many of the principles, and much also of the practice, of the Roman law (h). And early in the twelfth century, shortly after the discovery of the Pandects, schools for the study of the Roman, *i.e.*, civil law, were established in England, *e.g.*, the school of Irnerius at Oxford. The familiar study of the civil law would, but for the untoward circumstances hereinafter mentioned, have gone far to obviate the necessity for any distinction between the jurisdictions of equity and of common law in England, and in this precise way, *viz.*, the Roman law itself had from natural causes developed in the course of its history the like distinction, and had afterwards invented and effectively applied a method for abolishing, and had in



fact abolished, the distinction. So that the English law had merely to receive instruction from the Roman law, in order to forestall the growth of the distinction ; but various circumstances have from time to time operated to prevent, and have prevented, the complete incorporation of the principles and practice of the Roman law into the English law. And in point of fact, the English law, it will be found, probably from being left to its own natural genius, has pursued a course remarkably analogous to the Roman law in its historical development, that is to say, it first developed the distinction between law and equity, and it has eventually invented and successfully applied a method for abolishing the distinction,—in the common fusion of the two.

1. It has always been held, that the principles of the common law are founded in reason and equity ; and so long as the common law was in the course of its formation, it was capable—as indeed it has ever continued to be to some extent—not only of being extended to cases not expressly provided for by, but falling within the spirit of, the existing law, but also of having the principles of equity applied by the judges in their decisions, as circumstances arose which called for the application of such principles. But in course of time, and at a very early time, the common law completed its development, like a girl does her education ; precedents were established by the judges, and were considered binding on succeeding judges ; and it became difficult (and in numerous instances impossible) to make new precedents without interfering with those which had already been established. Hence, though new precedents have ever continued to be made, the common law became to a great extent a *jus strictum*, i.e., a system positive and inflexible, too early ; and the rules of justice could not (or, at all events, would not and did not) accommodate them-

Reasons of separation between the two systems,—common law and equity.

1. The common law became a *jus strictum* rather early.

selves to the exigencies of new circumstances and new cases (*i*).

2. The Roman law was deprived of authority in the courts.

2. The Roman law, on the other hand, was incapable of universal application; *e.g.*, the laws governing the tenure of land in England were founded on feudal principles, and involved distinctions, which, although not altogether alien to the doctrines of the Roman law, were most inadequately expressed therein. Moreover, the Roman law, even in its limited applicability to England, received from temporary and regrettable occasions a severe and lasting check in England. For it appears, judging at least from the current histories, that in the reign of Edward III. the court of Rome had become odious to the English king and people; and that an almost general dislike, on the part of the laity at least, to everything connected with the Holy See had begun to spring up. The very name of the Roman law became (it is alleged) the object of aversion. And in the next following reign of Richard II, the barons protested that they never would suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited (at least, as of authority) in the common law tribunals (*j*).

This discountenancing and general discouragement of the Roman law operated, of course, to aggravate the already positive and inflexible character of the common law. And this inflexibility was still further aggravated and perpetuated (at least, for centuries) by the next following cause of the separation between law and equity.

3. The system of procedure at common law was even more

3. Notwithstanding the obstacles aforesaid, the courts of common law might have become much more useful than they in fact did, had they not adopted an

---

(*i*) 1 Sp. 321, 322.

(*j*) 1 Sp. 346.

inflexible, inelastic, and cramping system of procedure. To the adoption of this inflexible procedure may be proximately attributed, though concurrently with the other causes noticed above, the eventual rise and rapid progress of the Court of Chancery as a separate jurisdiction.

inflexible than  
the principles  
themselves of  
the common  
law.

According to the common law every species of civil wrong was supposed to fall within some particular class, and for every such class of wrong an appropriate remedy existed. The remedy in question assumed the form of a *writ* or BREVE; and the writ or *breve* was the first step in every action. Thus, if a man had suffered an injury, it was not competent for him to bring to the notice of a court of law the facts of the case in a simple and natural manner by merely stating them, leaving the court to say whether upon the facts stated the case was one deserving of redress; but he had first to determine within what class of wrong his case fell, and then to apply for the appropriate remedy or writ. The evil effects of this system of procedure showed themselves in a twofold way:—

(a.) Even where the facts were such as to bring the alleged wrong within some one of the classes recognised at common law, the suitor was exposed to the risk of selecting an improper writ, and merely on that account failing in his action. This technical stumbling *in limine*, although from time to time relieved by subsequent legislation, continued to be a fertile source of injustice until the Common Law Procedure Act of 1852 (15 & 16 Vict., cap. 76), sec. 3, enacted that it should not be necessary for a plaintiff to mention any form of action in his writ of summons (*k*).

(b.) Another evil of the then system of procedure

---

(*k*) *Sharrod v. N. W. R. Co.*, 4 Exch. Rep. 580.

was, that if the alleged wrong did not fall within any recognised class of writ, the plaintiff was absolutely without any remedy at all. The writ was inflexible and not capable of adaptation. This second evil appears to have been very early felt; for in the 13 Edw. I. a remedy was attempted for it.

4. "The Statute in Consimili Casu," —attempted a remedy but failed.

4. At that time the writ for commencing actions at law was an original writ issuing out of the Chancery, and the drawing up of the writ was a part of the business of the clerks in Chancery. The remedy that was attempted was to give a larger discretion to the clerks in Chancery in the framing of the writ. It was accordingly enacted by the 13 Edw. I., stat. 1, cap. 24, that "whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case falling under like law and requiring like remedy none is found, the clerks of the Chancery shall agree in making the writ, or the plaintiff may adjourn it until the next Parliament; and the cases in which the clerks cannot agree are to be written and referred by them unto the next Parliament, and by agreement of men learned in the law a writ is to be made, lest it should happen that the court should long time fail to minister justice unto complainant."

This enactment, which is commonly called "The Statute in Consimili Casu," proved wholly inadequate to meet the evil complained of, and that for the two following reasons, viz:—

(aa.) The judges of the common law courts assumed, and very properly assumed, a discretionary jurisdiction to decide on the validity of the writs as adapted by the clerks in Chancery (l). Probably many of the adaptations were both clumsy and impractical, and so

lengthy and verbose as to render the writ or *breve* a misnomer. Anyhow, the common law judges refused to recognise them in very many instances.

(*bb.*) The progress of society and of civilisation, by giving rise to novel and unusual circumstances, increased the difficulty which the clerks in Chancery experienced in adapting new cases to old forms; and, no doubt, their well-meant but ineffective efforts only further aggravated the judges of the courts of common law. This occasion of difficulty was of course destined also to go on increasing. And further, in addition to new forms of *action*, new forms of *defence* also arose, for which no provision had been made (*m*), and which necessarily therefore fell beyond the jurisdiction of the common law (*n*).

(5.) When the common law judges could not or would not grant relief, the only course open to suitors was to petition the king in Parliament or in council; the sovereign, in those troubled times seldom without a foreign war or a rebellion at home to engage his whole attention, generally referred the matter to the "keeper of his conscience," the Chancellor; and finally, in the reign of Edward III., the Chancellor came to be recognised as a permanent judge, and the Court of Chancery as a permanent jurisdiction distinct from the judges and the courts of the common law, empowered to give relief in cases which required extraordinary relief. The last-mentioned king, in the twenty-second year of his reign, by an ordinance referred all such matters as were "of grace" to the Chancellor or Keeper of the Great Seal (*o*); and from that time, suits by petition or bill, without any preliminary writ, became the common course of procedure before the

5. The Lord Chancellor, by direction of the Sovereign and of Parliament, personally intervened, at length, in 22 Edw. III.

Ordinance of 22 Edw. III. as to matters "of grace."

(*m*) 1 Sp. 325.

(*n*) See 17 & 18 Vict., c. 125, s. 83.

(*o*) 1 Sp. 337.

Chancellor, *i.e.*, in the Court of Chancery. On this bill or petition being presented, it was at once looked into by the Chancellor, and if the Chancellor thought that the case called for extraordinary relief, a writ called a writ of *subpœna* was issued by command of the Chancellor, in the name of the king, *summoning the defendant to appear before the Chancery to answer the complaint, and to abide by the order of the court.* The personal examination of the bill or petition by the Chancellor was afterwards dispensed with, the signature of counsel to the bill or petition being accepted as a guarantee that the case was a proper one, sufficient to authorise the immediate issue of the writ of *subpœna* (*p*). Subsequently to and in consequence of the Chancery Jurisdiction Act, 1852 (15 & 16 Vict., c. 86), the writ of *subpœna* to appear to and answer the complaint was superseded, and was replaced by a mere indorsement of a writ to the like effect on the copy of bill served on the defendant. In effect, therefore, the bill became and was simply the first pleading on the part of the plaintiff in an action (or suit, as it was more commonly called) in the Court of Chancery.

The modern  
fusion of law  
and equity.

By and in consequence of the Judicature Acts, 1873-76, and the rules and orders made thereunder (*q*), law and equity have in substance and effect been fused into one system, and a uniform system of procedure in the Chancery divisions, and in the Common Law divisions, has been introduced and become established. The particular steps in that new Procedure will be found detailed in Book the Second of this Treatise, *i.e.*, under the "Practice in Equity;" it is sufficient to mention here, in order to complete the historical outline of the origin of the Jurisdiction in Equity given above, that an action (as it is now called)

---

(*p*) Langdell's Summary of Equity Pleading.

(*q*) See Griffith and Loveland's Practice under the Judicature Acts, 2d ed.

in the Chancery division of the High Court is now commenced, as in the Common Law division, by issuing a writ, which may or may not be (but usually is) afterwards followed up by a statement of claim on the part of the plaintiff, such statement of claim corresponding (excepting in, for the present, immaterial respects) with the old bill or petition to the Lord Chancellor, and being as heretofore the first pleading properly so called on the part of the plaintiff in an action.

From the preceding historical *résumé*, it will be seen that (as already hinted) the English Law has followed, in the history of its development, in the lines that the Roman Law pursued, or in like lines thereto, —first inventing the distinction between law and equity, and then inventing a means of abolishing the distinction. And let no one imagine that what two such nations as the Roman and the English have found cause to do, in respect either of the distinction itself or of the abolition thereof, has been or is either causeless or anomalous.

Prior to the Judicature Acts, 1873-76, it was usual, in treatises on equity, to classify the various subject-matters falling within the jurisdiction of equity *by relation to the common law*, and accordingly to subdivide the jurisdiction into, and to arrange these various subject-matters under, three heads, viz., the *exclusive*, the *concurrent*, and the *auxiliary* jurisdictions in equity. However, now by the Supreme Court of Judicature Act, 1873, it is enacted, that in every civil cause or matter, law and equity shall be administered *concurrently*; and that in all matters not particularly mentioned in the Act, where there is any conflict or variance between the rules of equity and the rules of the common law, the rules of equity shall prevail (*r*).

Classification  
of equity  
jurisdiction,—  
prior to, and  
so far also as  
affected by,  
the Supreme  
Court of Judi-  
cature Act,  
1873.

---

(*r*) 36 & 37 Vict., c. 66, ss. 24, 25, § 11.

But by the 34th section of the same Act, it is expressly enacted that there shall be assigned (subject to the general provisions of the Act) to the Chancery division (besides other matters not material to specify) all causes and matters for any of the purposes specified in the now stating section, and being the following various matters, that is to say,

1. The administration of the estates of deceased persons ;
2. The dissolution of partnership, and the taking of partnership and other accounts ;
3. The redemption and foreclosure of mortgages ;
4. The raising of portions and other charges on land ;
5. The sale and distribution of the proceeds of property subject to any lien or charge ;
6. The execution of trusts, charitable and private ;
7. The rectification, the setting aside, and the cancellation of deeds and other written instruments ;
8. The specific performance of contracts between vendors and purchasers of real estate, including contracts for leases ;
9. The partition or sale of real estates ; and
10. The wardship of infants, and the care of infants' estates.

The effect, therefore, of the Act is, nominally, to put an end to the exclusive jurisdiction, as such, of the Court of Chancery, and to render that jurisdiction concurrent in all cases ; but the effect of it, practically, is to retain as exclusive all that part of the jurisdiction which was formerly exclusive ; and for that reason, as also because the above-mentioned distinctions illustrate historically the growth of the equity jurisdiction, and for other sufficient reasons of practical utility



appearing in the sequel, it has been thought expedient to retain the distinctions in the present edition.

I. Subject to the provisions of the last-mentioned I. *Exclusive*. Act, equity may be said to have exclusive jurisdiction in respect of all matters above enumerated that are expressly assigned to it by the Act, and also generally in all cases where there are any particular rights capable of being judicially enforced, but for which no forms of action were available at law.

II. In consequence of the said last-mentioned Act, II. *Concurrent*. equity now has a concurrent jurisdiction with law in all matters whatsoever, subject only to the provisions of the Act; but equity always had, even before the Act, a concurrent jurisdiction with the courts of common law in all cases where the law did not afford *adequate* relief, or where no, or no complete, relief could be obtained at law except by circuitry of action, or by multiplicity of suits, and adequate and complete relief could be given in equity in one and the same action, as in the cases of accident, mistake, fraud, specific performance, and the like.

III. Prior to the Judicature Acts, equity had no III. *Auxiliary*. substantive jurisdiction in any of those cases in which the matter was exclusively cognisable at law; but if the courts of law, from any deficiency in their machinery, or defects in their procedure, were unable (as often happened) to procure that evidence which a court of equity could obtain by its more flexible and searching system of examination, then in every of such cases equity interposed its jurisdiction in aid of the courts of common law by providing such necessary evidence, unless restrained from doing so by equitable considerations of its own (s). On the other hand, where

---

s) 14 & 15 Vict., c. 99, s. 6; 17 & 18 Vict., c. 125, ss. 50, 51.

the courts of law could always afford adequate relief without the aid of equity and without circuity of action or multiplicity of suits, and could also take due care of the matter of evidence, and generally of the rights of all parties interested in the suit, equity had no jurisdiction (*t*). And in the proportion that the jurisdiction of equity in aid merely of the common law became (as it gradually did) less and less necessary,—the courts of common law becoming in the meantime more and more competent in themselves,—so in the like proportion the jurisdiction of equity “in aid,” and which was thence called the “auxiliary” jurisdiction, grew more and more into disuse; and since the Judicature Acts, it is difficult to imagine any case in which the auxiliary jurisdiction proper can be wanted. But some such cases may, and doubtless will, arise in time.

2.

---

(*t*) 2 Sp. 16.

## CHAPTER II.

## THE MAXIMS OF EQUITY.

EQUITY is pre-eminently a science ; and like geometry or any other science, it starts with and assumes certain maxims, which are supposed to embody and to express the fundamental notions of the science. A common element of equity pervades each of the maxims, which sometimes gives them the appearance of running into each other ; but with a little practice they are readily distinguishable ; and it is highly necessary to keep the distinctions between them clear. Each maxim, therefore, both merits and requires a separate treatment,—as well a separate exposition as also a separate illustration of it. The maxims peculiar to equity are the following :

1. Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy. Maxims of  
Equity.
2. Equity follows the law, — *Æquitas sequitur legem.*
3. Where there are equal equities, the first in time shall prevail.
4. Where there is equal equity, the law must prevail.
5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Delay defeats equities, — *Vigilantibus non dormientibus, æquitas subvenit.*
8. Equality is equity.
9. Equity looks to the intent rather than to the form.

10. Equity looks on that as done which ought to have been done, or which has been agreed or directed to be done; and
11. Equity imputes an intention to fulfil an obligation.

1. Equity will not, by reason of a merely technical defect, suffer a wrong without a remedy.

1. *Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy.*—It will be evident that this maxim is at the foundation of a large proportion of equity jurisprudence, so far as that jurisprudence aims at supplying the defects which at one time existed in the common law. For example, in the case of an outstanding dry legal term, prior in date to the plaintiff's title to an estate,—and which term, although a merely technical objection, would at law have prevented the plaintiff from recovering in ejectment,—the court of equity interposed to put the term out of the plaintiff's way, and even permitted him by means of an “ejectment-bill,” as it was called, to recover the very possession of the land itself without regard to the term. Similarly, in the case of a mortgagor seeking to recover an estate or rent, the fact of the legal estate being in the mortgagee was no impediment in equity; and under the Judicature Act, 1873, sect. 25, sub-sect. 5, the rule in equity is made to prevail for the future at law also. The maxim must, however, be understood with the following limitations,—it must be understood as referring to rights which come within a class enforceable at law, or capable of being judicially enforced, and the enforcement of which would not occasion a greater detriment or inconvenience to the public than would result from leaving them to be disposed of *in foro conscientiae*; and it must also be understood as referring to cases where there is no equal or superior adverse right or adverse equity in the private individual who is made defendant; and to cases where the plaintiff who is remediless at law has not lost his remedy there by his own

conduct or default. And it must also be remembered, that many real wrongs are not remediable at all, either at law or in equity; and that a still larger class of apparent wrongs are not wrongs at all, excepting in the imagination of the suitor; of course, the maxim does not apply to such.

2. *Equity follows the law.*—This maxim has two principal applications, viz. :—

2. Equity follows the law.

(a.) In its concurrent jurisdiction, that is to say, as regards *legal* estates, rights, and interests, equity is strictly bound by the rules of law, and has no discretion to deviate from them.

(b.) In its exclusive jurisdiction (including for this purpose its auxiliary jurisdiction also), that is to say, as regards *equitable* estates, rights, and interests, equity, although not strictly speaking *bound* by the rules of law, yet acts in analogy to these rules, wherever an analogy exists.

But the maxim in both its applications must be taken with this limitation—that equity will suffer the rules of law to govern, and the course of law to proceed, in the absence, and only in the absence, of any circumstances which render it incumbent on a court of equity to interpose in accordance with the maxim previously mentioned, that equity will not suffer a wrong to be without a remedy (u).

Limitations of the rule.

(a.) As an illustration of the first application of this maxim, it is well settled that equity follows the law as to the rule of primogeniture, although that rule, in

(a.) Concurrent jurisdiction: Primogeniture, and rules of descent generally.

---

(u) Sm. Man. 14, 15.

any particular instance in which it is so followed, may be productive of the greatest hardship towards all, or some, or one, of the younger members of a family, by leaving them, for example, without any sort of provision, while the eldest son may be in affluence. These accidental circumstances create no equitable right, or equity, in favour of the youngest son against the eldest, and do not demand the interposition of a court of equity. The mere absence or want of provision, a circumstance arising perhaps from the culpable neglect of the parent, can create no equity against the eldest son, who has a right to the descended or entailed estate, without any reference to the circumstances of the other members of the family. No relief could be given in such a case as that, without directly breaking through a rule of law, which a court of equity never does, and has no power to do.

Following the law, equity may at the same time avoid it in effect.

And where the circumstances are of a different kind, that is to say, are sufficient to create an equitable right, or equity, then even there a court of equity never does break through a rule of law, or refuse to recognise it, because it has no power and no discretion in the matter; but while recognising the rule of law, and even maintaining it, a court of equity will in a proper case get round about, avoid, or obviate it. For example, if an eldest son should prevent his father from executing a proposed will devising one estate to a younger brother, by promising to convey such estate to such younger brother, and that estate should accordingly descend at law to the eldest son, a court of equity would interpose and say,—“True it is, you (the eldest son) have the estate at law, in other words, the legal estate; that we don’t deny or interfere with; but precisely because you have it, you will make a convenient trustee of it for your younger brother, who (in our opinion) is equitably entitled to it.”

And again, in *Loffus v. Maw* (v), a testator in advanced years and in ill health induced his niece to reside with him as his housekeeper, on the verbal representation that he would leave her certain property by his will, which he accordingly prepared and executed, but subsequently by a codicil revoked. The court directed that the trusts of the will in favour of the niece should be performed. It held, that in cases of this kind, a representation that property is to be given, even though by a revocable instrument, is binding, where the person to whom the representation is made has acted upon the faith of it to his or her detriment; and that it is the law of the court, grounded on such detriment, that makes it binding; and that it does not matter that the represented mode of gift is of an essentially revocable character. There is here no setting aside of law; but there is the like avoiding of law as in the former case.

(b.) As an illustration of the second application of the maxim now being explained, it may be mentioned (but only briefly in this place, as the matter will be considered at proper length in the following chapter, upon Trusts), that in construing the words of limitation of trust estates in deeds and wills, at least where the trust estate is executed, and in some cases even where it is executory also, a court of equity follows the rule of law familiarly identified as the rule in *Shelley's case*, and also observes all the other rules of law for the construction of the words of limitation of legal estates. But where the trust estate is executory only, and the court sees an intention to exclude the rules of law for the construction of the words of limitation, then, and in that case, the court carries out the intention in analogy to the rules of law, but not in servile obedience to them, where such obedience would defeat the execution of the intention.

*Loffus v. Maw.*  
—instance of  
equity avoiding  
the law.

Exclusive  
jurisdiction :  
Words of limitation in deeds  
and wills,—  
trusts executed, and  
trusts executory.

---

(v) 3 Giff. 592. And see *Meluish v. Milton*, L.R. 3 Ch. Div. 27.

(a. and b.) Con-  
current and  
exclusive juris-  
dictions : The  
Statutes of  
Limitations.

(a. and b.) As an illustration of the maxim in both of its applications, we may refer to the manner in which equity deals with the statutes of limitation for actions and suits. The old statutes of limitation were in their terms applicable to courts of law only; nevertheless, equity by analogy acted upon them, and refused relief under like circumstances. On the other hand, the modern statutes of limitation (3 & 4 Will. IV., c. 27, and 37 & 38 Vict., c. 57) are in their very terms applicable to courts of law and of equity indifferently. Moreover, apart from any statutes, and for reasons of its own, equity always discountenanced, and still discountenances, laches, and held and holds that laches is presumable in cases where it is positively declared at law. Thus, in cases of equitable title to land, equity required and requires relief to be sought within the same period in which an ejectment would lie at law (*w*); and in cases of personal claims, it also required and requires relief to be sought within the period prescribed for personal suits of a like nature (*x*). And although there are not (because there could not be) any cases where the statutes would be a bar at law, in which equity has given or could give relief; yet, on the other hand, there are many cases where the statutes would not be a bar at law, in which equity has notwithstanding refused relief. In other words, the rule of equity regarding the statutes of limitation may be stated (and, it is believed, with accuracy) thus,—that in its exclusive jurisdiction equity never exceeds, although, for reasons of its own (such as laches, &c.), it often stops a long way short of or within the limit of time prescribed at law; and that, in its concurrent jurisdiction, equity never either exceeds or abridges the limit of time prescribed at law (*y*). This exemplifies the two-

---

(*w*) *Beckford v. Wade*, 17 Ves. 99.

(*x*) *Knox v. Gye*, L. R. 5 H. L. 656; 21 Jac. I. c. 16; 9 Geo. IV., c. 14; 19 & 20 Vict., c. 97 (simple contract claims); 3 & 4 Will. IV., c. 42 (specialty contract claims).

(*y*) *Fullwood v. Fullwood*, 9 Ch. Div. 176.



fold operation of the maxim under discussion, equity in its concurrent jurisdiction being a slave to law, and in its exclusive jurisdiction being free (within the limits of law) to give weight to considerations of its own. The rule, as above stated, may be taken to be without any exception, although some of the books talk of exceptions to the rule, from having failed to grasp the rule. And, *nota bene*, time runs both at law and in equity from the discovery of the fraud (where the action is grounded on fraud), and not from the perpetration of the fraud (z); but this is no exception to the rule.

3. *Qui prior est tempore, potior est jure*. Where equities are equal, the first in time shall prevail. This maxim is often misunderstood. It has been understood by some as meaning, that as between persons having only equitable interests, *Qui prior est tempore, potior est jure*—but this proposition is far from being universally true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where the equitable interests are of precisely the same nature, and in that respect precisely equal; for example, in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, if the second assignee has given notice to the trustee and the first has omitted to do so, the second assignee has priority over the first (a). Another form of stating the rule is thus: “As between persons having only equitable interests, if their equities are equal, *Qui prior est tempore, potior est jure*.” This mode of stating the rule is not so obviously incorrect; yet, when examined, it is seen to involve a contradiction. For, when we talk of two persons having equal or unequal equities, in what sense do we

3. *Qui prior est tempore, potior est jure.*

---

(z) 3 & 4 Will. IV., c. 27, § 26. (a) *Loveridge v. Cooper*, 3 Russ. 30.

use the word "equity"? For example, when we say that A. has a better equity than B., what is meant by that? It means only this—that according to those principles of right and justice which a court of equity recognises and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B.; and therefore it is impossible, strictly speaking, that two persons should have "equal equities," except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the "equities" of the two are equal; *i.e.*, in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? The rule may be correctly stated thus,—that, as between persons having only equitable interests, if such equities are *in all other respects* equal, *Qui prior est tempore, potior est jure*—that in a contest between persons having only equitable interests, priority of time is the ground of preference *last resorted to*; *i.e.*, that a court of equity will not prefer one to the other on the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground of preference between them; or, in other words, that their equities are in *all other respects* equal; but if the one has on other grounds a better equity than the other, priority of time is immaterial (*b*). A single case will for the present suffice to illustrate the application of this maxim. A., B., C., three vendors entitled in common to a piece of land, sold the land to D.; on the day for completion of the purchase, A., B., C., and D. all attended at the office of the vendors' solicitor, when D. paid A. and B. their respective shares of the

True rule.

---

(b) *Rice v. Rice*, 2 Drew, 73. And see *Spencer v. Clarke*, 9 Ch. Div. 137.

purchase-money, but put off C. (who was a friend) until the day following, having promised C. faithfully to pay him his proportion of the purchase-money on that following morning. Then A. and B., and also C., executed the deed of conveyance to D., in which the payment of the *entire* purchase-money was acknowledged by A. and B., and also by C., and A. and B. and also C. severally also signed receipts indorsed on the deed of conveyance for their respective purchase moneys. Then C. very negligently and foolishly let D. take away the deed of conveyance (together with the other deeds) in his bag, although C. should have kept the deed and deeds at his solicitor's until payment of his share of the purchase-money. D. the same afternoon deposited the deeds with his bankers and never paid C. at all: Held, as between the bankers (equitable mortgagees by deposit) and C. (vendor having equitable lien), that the bankers, although second in date, were first in right, because of C.'s negligence (*c*).

4. *Where there is equal equity, the law must prevail.*—This maxim is intimately connected with the one immediately preceding it; each depends on the other for its complete elucidation; each is the supplement of the other. The maxim immediately under consideration may be thus briefly explained: If the defendant has a claim to the passive protection of the court equal to the claim which the plaintiff has to call for the active aid of the court, he who has the legal estate will prevail. The case of *Thorndike v. Hunt* (*d*) furnishes a remarkable illustration of the application of this rule. The trustee of a sum of stock for T. was ordered, in a suit instituted by his *cestui que trust*, T., to transfer the money into court. The transfer was made, and the fund was treated as belonging to T.'s

4. Where there is equal equity, the law must prevail.

(c) *Rice v. Rice*, 2 Drew, 73.

(d) 3 De G. & Jo. 563.

estate. The legal estate, therefore, vested in the Accountant-General (now Paymaster-General), for the purposes of T.'s trust. But it afterwards appeared that the trustee had provided himself with the means of paying T.'s fund into court by fraudulently misappropriating funds which he held in trust for another *cestui que trust*, B. The question was whether B. had a right to follow the money into court as against T.'s estate. It was held that B. had no such right, and for the following reasons:—That T. had no notice of the want of equitable title or honest right in the trustee to make this payment with B.'s money; that the transfer was for valuable consideration, because there was a debt due from the trustee for which the trustee would have been liable by execution of his goods, or by other means; that therefore B.'s right or equity to follow the money being no greater than T.'s right to retain it, the circumstance that the legal title was held for T. by the Accountant-General was sufficient to create a preference in favour of T. It is to be observed that B. was not altogether without a remedy, for, of course, he could proceed against the defaulting trustee personally for the trust money; but the case is a very hard one, and the like of which will not easily succeed again, the editor believes (e).

Defence of purchase for valuable consideration without notice.

General remarks as to its scope.

The most important class of cases in which the two connected maxims have received a practical application, are those where a purchaser sets up the defence that he has purchased for valuable consideration without notice of the adverse title. The person setting up this plea thereby admits that on his purchase a good title did not pass to him: it likewise assumes a conflict between a legal and an equitable title; or between the holder of a title legal or equitable, and a person who is trying to assert an equity against him. It is evident

---

(e) *Stackhouse v. Jersey (Countess)*, 1 J. & H. 721.

from the nature of the case that the question cannot arise between two legal titles, for their co-existence in two adverse individuals in respect of the same subject-matter is impossible. Nor can the plea be used by a person having an equitable title against another having equal equity who is prior in point of time. Having premised these remarks with regard to the general scope of this species of defence, it is proposed to direct the attention of the student to the various cases in which the defence may, or may not, be made available.

*Rule 1.* Where the person who sets up the plea has the legal estate, or even the best right to call for the legal estate, a court of equity will grant no relief against him.

(a.) Plaintiff having equitable estate only, defendant legal estate and equitable estate both.

Nothing can be clearer than that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim, Where equities are equal, the law shall prevail. Thus A., the owner of an estate, contracts with B. to sell it to him, and B. pays a part of the purchase-money before the conveyance to him has been actually executed; in law, until the actual conveyance of the property to B., he has no title; whereas, in contemplation of equity, which looks on that as done which ought to have been done, B., from the moment of the contract, is the owner of the estate. If, then, A., after this contract of sale with B., makes an absolute conveyance of the legal estate to C., who purchases it for valuable consideration without notice of B's lien or claim; here, as C. has the legal estate in him, and has besides purchased *bonâ fide* for value without notice, and his equity to retain the estate is equal to B's right to enforce his equitable lien on it or claim to it, therefore the court of equity will refuse to give B. any relief as against C.

1. Where purchaser obtains the legal estate at the time of purchase.

2. Where purchaser gets in the legal estate subsequently.

Not only is it clear that a purchaser for valuable consideration without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, will be protected, but it has also been decided that such a purchaser who has not obtained the legal estate at the time, may protect himself by subsequently getting in the outstanding legal estate, so long as he does not by that act become a party to a breach of trust (*f*); because, as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity or diligence (*g*).

In *Phillips v. Phillips* (*h*), the law on the point is thus laid down by Westbury, L. C.:—"It is well known that if there are three encumbrancers, and the third encumbrancer, at the time of his encumbrance and payment of his money, had no notice of the prior encumbrances, then if the first mortgagee or encumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has so acquired, and to exclude the intermediate encumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title, for if the first mortgagee has not the legal title, the third mortgagee, by paying off the first, and obtaining a mere equitable transfer, acquires no priority thereby over the second."

3. Where purchaser has the best right to call for the legal estate.

And not only where the purchaser has *actually obtained*, but where he has the *best right to call for* the legal estate, will he be entitled to the protection of

(*f*) *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Ha. 272.

(*g*) *Goleborn v. Alcock*, 2 Sim. 552; *Pilcher v. Rawlins*, 7 L. R. Ch. 259, overruling *Carter v. Carter*, 3 K. & J. 617.

(*h*) 10 W. R. 237; 31 L. J. Ch. 321; 8 Jur., N. S. 145; 5 L. T., N. S. 665.

equity. Thus, in *Wilmot v. Pike* (i), a first mortgage of the X. estate was made to A. in fee. A second mortgage in 1826 was then made to B. of the same estate, together with the Y. estate, by a release and conveyance of the respective premises to C. as a trustee for B., with power of sale. B. afterwards, in 1835, advanced a further sum to the mortgagor on the security of the same estates X. and Y., but gave no notice of the further advance either to A. or to C. Subsequently C., in 1840, after inquiry of A., whether he had notice of any encumbrance other than his own and that of which C. was trustee for B., advanced a further sum on his (C.'s) own account to the mortgagor on the same security, and gave notice of his mortgage to A. The question in the cause arose between B. and C. in respect of the third and fourth mortgages of 1835 and 1840 respectively, as to which was entitled to priority. It was held that, as to the X. estate, B. was entitled to priority over C. according to the maxim, *Qui prior est tempore, potior est jure*; for as regards that estate, B. and C. had only equitable interests, the legal estate being outstanding in A., the first mortgagee. But with regard to the Y. estate, C., the fourth mortgagee, having the legal estate in him, although by virtue only of his position as a trustee in the second mortgage of 1826, and also having advanced his money without notice of B.'s further advance in 1835, was entitled to priority over B. as to such further advance. "If a first encumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second encumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second encumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would in that

What constitutes the best right to call for the legal estate?

case have a better right to call for the legal estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. His case, however, might perhaps be supported on the simple ground that he had the legal estate, and advanced his money without notice, leaving every trust of which he had notice untouched by his present claim." Cases where questions arise between volunteers and subsequent purchasers for value may also be classed under this head (*j*). A purchaser for value or mortgagee, having obtained possession of all the title-deeds, would likewise have the best right to call for the legal estate.

(*b.*) Plaintiff having legal estate and defendant the equitable estate :  
(*aa.*) Auxiliary jurisdiction.

*Rule 2.* Where an application is made to the *auxiliary* jurisdiction of the court, as contradistinguished from its *concurrent* jurisdiction, by the possessor of a legal title, and the defendant pleads he is in possession as a *bonâ fide* purchaser for value without notice, the defence is good, and the court gives no aid to the legal title. This branch of the subject will be illustrated by the following cases :—

*Basset v. Nosworthy*—discovery simply.

In *Basset v. Nosworthy* (*k*), a bill was filed by an heir-at-law, claiming, under a legal title, against a person claiming as purchaser from the devisee under the will of his ancestor, but which will the plaintiff alleged had been revoked. The prayer of the bill was for discovery of the revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration, *bonâ fide*, without notice of any revocation, and the plea was allowed. Of course, the plaintiff might afterwards proceed at law in an action of ejectment, endeavouring there to make out his case upon his own evidence.

(*j*) *Buckle v. Mitchell*, 18 Ves. 100.

(*k*) 2 L. C. 1.



Again, in *Wallwyn v. Lee* (l), a tenant in tail, in possession under a marriage settlement, filed a bill for discovery and delivery up of the title-deeds of an estate which had been mortgaged by his father, who was tenant for life under a settlement and a private Act of Parliament. The defendant pleaded that the plaintiff's father, alleging himself to be seized in fee, and being in actual possession of the premises as apparent fee-simple owner, and being also in possession of the title-deeds relating thereto as apparent fee-simple owner thereof, executed the several mortgages under which the defendant claimed, and the defendant averred that he had no notice of the alleged fact that the plaintiff's father was only tenant for life. It was argued for the plaintiff, that as the defendant was neither in possession, nor had the means of procuring it, the court ought not to allow him to keep the deeds for the sole purpose of (what counsel chose to call) extortion. It was held, however, that the plea was a good defence. "This bill," said Lord Eldon, "is filed by a person having got possession. If the principle is that this court will not stir against a purchaser for valuable consideration without notice, what are the legal rights of the son, tenant in tail when his father's estate determines? His legal rights are that he shall have possession of the estate. I do not know that I am entitled to say as much of the title-deeds, but only that he may recover in trover the value of the deeds, or in detinue (m), in which the judgment is for the deeds, or their value. But without attending to the imperfection of the law in such actions, which is probably the ground of jurisdiction here for the specific delivery up of the thing, I will suppose his right at law to the specific delivery up. It is true he is not seeking in equity to recover possession of the estate; but he is seeking to recover something which he can-

(l) 9 Ves. 24.

(m) See 17 &amp; 18 Vict., c. 123, s. 78.

not recover at law, the value of which *non constat* he can recover at law without the discovery of the deeds. Is it of necessity, then, that this court must hold, as against a purchaser for valuable consideration without notice, that if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by the court, and thrown to the person who has got from him the possession of the estate? Is it not worth while considering rather, whether the very principle of the plea is not this:— 'I have honestly and *bonâ fide* paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide*.' ”

*Joyce v. De  
Moleyns,*—  
delivery up.

The principle of the last-mentioned decision was followed by Lord Chancellor Sugden in *Joyce v. De Moleyns* (n). There the heir-at-law obtained possession of title-deeds relating to impropriate tithes, of which his second brother, under the will of their father, was tenant for life, and deposited them with bankers, by way of equitable mortgage, to secure a sum which the bankers advanced to him. On a bill being filed by the administrator of a bond creditor of the father for the administration of his estate, praying that the bankers might be decreed to deliver up the deeds, the bankers insisted that they were purchasers for valuable consideration, without notice of the will or of the title of any persons claiming thereunder, or of the demands of the plaintiff, and submitted that the bill should either be dismissed, or that the plaintiff should pay off the mortgage. The Lord Chancellor dismissed the bill as against the bankers, with costs. “I apprehend that the defence of a purchase for value

without notice is a shield as well against a legal as against an equitable title. That this is a good defence cannot be denied. Suppose a tenant for life under a will with remainder over, and that the tenant for life, being heir-at-law of the testator, conveys the inheritance to a purchaser without notice; the remainderman cannot have any relief in equity against the purchaser. He must establish his title outside of this court as well as he can. It is the same with respect to title-deeds. The defendants, therefore, use the possession of the deeds as they have a right to do, as a shield to protect them against the plaintiffs. They can make no use of the deeds themselves; they cannot maintain possession of them against the true owner; but in this court they have a right to say that they ought not to be compelled to deliver them up, as they obtained them *bonâ fide* and without fraud" (o).

But, as already suggested, it seems that this rule (bb.) Concurrent jurisdiction. does not apply where the Court of Chancery, *con-* currently with courts of common law, affords legal as distinguished from equitable relief. The case of *Williams v. Lambe* (p) well illustrates this distinction. There a widow filed a bill against a purchaser from her husband, claiming her dower. The defendant pleaded that he was a purchaser of the estate for value without notice of the vendor being married. Lord Thurlow, however, overruled the plea. The same rule applies to a suit for tithes (q).

*Rule 3.* This rule is best stated in the words of (c.) Plaintiff having equit-

(o) See also *Heath v. Crealock*, L. R. 18 Eq. 215; and, on appeal, 10 Ch. App. 22.

(p) 3 Bro. C. C. 264.

(q) *Collins v. Archer*, 1 Russ. & My. 284; see also *Finch v. Shaw*, 19 Beav. 500; and Lord Westbury's remarks in *Phillips v. Phillips*, 8 Jur. N.S. 145; 10 W. R. 237; 31 L. J. Ch. 321; 5 L. T. N.S., 655.

able estate  
only, defend-  
ant also  
having equit-  
able estate  
only.

Lord Westbury in *Phillips v. Phillips* (r): "Now I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to, and no more. If, therefore, a person possessed of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage, or grants an annuity and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate, subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and encumbrancers claiming only in equity take and are ranked (*scil.*, in the absence of exceptional circumstances) according to the dates of their securities, and the maxim applies *Qui prior est tempore, potior est jure*. The first grantee is *potior*, that is, *potentior*. He has a better and a superior, because a prior, equity. The first grantee has a right to be paid first; and it is quite immaterial whether the subsequent encumbrancers, at the time they took their securities and paid their money, had notice of the first encumbrance or not." Thus in *Ford v. White* (s), property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s encumbrance; C. registered his mortgage before B., and afterwards assigned to D., who had no notice of B.'s mortgage. Held by Sir J. Romilly, M.R., that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put him in a better situation than himself, and consequently that D. was not entitled to priority over B.,—the prior registration by C. notwithstanding.

Notice of first  
encumbrance  
immaterial.

(d.) Plaintiff  
having an  
equity merely

Rule 4. Where there are circumstances that give rise to an "equity," as distinguished from an "equitable

estate ;" for example, an equity to set aside a deed for fraud, or to correct it for mistake or accident, and the purchaser under the instrument puts forward the plea of purchase for valuable consideration without notice, the court will not interfere. Thus, in *Sturge v. Starr* (t) a man, already married, performed the ceremony of marriage with a woman, and then joined with her in assigning her life interest in a trust-fund to a purchaser. *Held*, that though she might not have executed such an instrument had she been aware of the fraud practised upon her, that fraud could not affect the rights of a *bonâ fide* purchaser. This female had, doubtless, the strongest equity possible; but that equity, however strong *in se*, was no equity *as against the purchaser*.

and not an equitable estate, defendant having both legal and equitable estates.

*The Doctrine of Notice.*—No equitable doctrine is better established than that the person who purchases an estate, although for valuable consideration, after notice of a prior equitable right, makes himself a *malâ fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat. Thus, in *Potter v. Sanders* (u), it was held that if a vendor contract with two different persons for the sale to each of them of the same estate, and if the party with whom the second contract is made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of his second contract, the court will, in a suit for specific performance by the first vendee against the vendor and second purchaser, decree the latter to convey the estate to the plaintiff. And to such an extent has the doctrine of notice been allowed to prevail, that it has even infringed upon the policy of the Registration Acts. Thus, in *Le Neve v. Le Neve* (v),

The doctrine of notice.

Purchaser with notice of prior claim, a trustee to the extent of such claim.

(t) 2 My. & K. 195.

(u) 6 Hare, 1.

(v) 2 L. C. 35.

where lands in a register county, settled on a first marriage by deed which was not registered, were settled upon a second marriage, with notice of the former settlement, by deed which was registered pursuant to the statute, it was held that the former settlement should be preferred in equity to the latter settlement. "This is a species of fraud and *dolus malus* itself; for there is express knowledge that the first purchaser had the clear right to the estate, and with that knowledge an attempt is made to take away that right by getting in the legal estate." It must be borne in mind, that in the last-mentioned case, the husband who registered the second settlement was the person to blame for not registering the first. It also requires a very strong case to get over the effect of the local Registry Acts; *e.g.*, express notice amounting to fraud is required, and merely constructive notice is not sufficient (*w*).

*Secus*,—sub-purchaser with notice, if his vendor bought without notice. Or sub-purchaser without notice, though his vendor bought with notice.

It has long been settled that if a person purchases for valuable consideration with notice, from a person who bought without notice, he may shelter himself under the first purchaser, for otherwise the first or *bonâ fide* purchaser would be unable to deal with his property, and the sale of estates would be very much clogged; and even if a person who buys with notice sells to a *bonâ fide* purchaser for valuable consideration without notice, the latter may protect his title. In *Harrison v. Forth* (*x*), A. purchased an estate with notice of the plaintiff's encumbrance, and then sold it to B., who had no notice, who afterwards sold it to C., who had notice. *Held*, that though A. and C. had notice, yet if B. had no notice, the plaintiff could not be relieved against the defendant C. In this and similar cases, it may be assumed that the estate which

(*w*) *Lee v. Clutton*, 24 W. R. 106; and, on appeal, 942; 45 L. J. Ch. 43; *Bradley v. Riches*, 26 W. R. 910; 9 Ch. Div. 212.

(*x*) *Prec. Ch.* 51; and see *At y. General v. Bi-phosphated Guano Co.*, 11 Ch. Div. 327.

A. had, which was successively assigned to B. and C., was the legal estate. Had the estates been equitable, as will have been seen from the third rule of this maxim, A., having had notice of a prior encumbrance, could not, by concealing his knowledge from B., make B.'s purchase more extensive than his own, or give a better right to his assignee than that which he himself possessed.

A purchaser for valuable consideration of an estate, even with notice of a voluntary settlement, will not be affected by it, even though such voluntary settlement be in itself free from fraud, or even meritorious as a provision for relations (y). This is a consequence of the words of the statute 27 Eliz. c. 4, against fraudulent conveyances.

Notice of  
voluntary  
settlement  
does not affect  
subsequent  
purchaser.

*What Constitutes Notice.*—Notice is either actual or constructive, but there is (in general) no difference between them in their consequences (z), although in exceptional cases (as has been just pointed out) constructive notice has not the effect of actual notice. And, for many reasons, it is necessary to distinguish between actual and constructive notice.

What consti-  
tutes notice.

1. As to actual notice, it suffices to say, that in order to make it binding, it must be given by a person interested in the property, and in the course of the negotiations (a). Vague reports from persons not interested in the property will not affect the purchaser's conscience, nor will he be bound by notice in a previous transaction which he had forgotten. And not only is a mere assertion that some other persons claim a title not sufficient, but even a general claim by the person

Actual notice.

---

(y) *Buckle v. Mitchell*, 18 Ves. 100.

(z) *Prosser v. Rice*, 28 Beav. 68.

(a) *Barnhart v. Greenshields*, 9 Moo. P. C. 18.

himself who gives the notice, is perhaps not sufficient to affect a purchase (b).

Rule in *Lloyd v. Banks*.

In the recent case of *Lloyd v. Banks* (c) it was laid down by Cairns, L. C., that if it could be shown that a trustee in any way had got knowledge of a kind to operate upon the mind of any rational man, or man of business, and to make him act with reference to the knowledge so obtained, then there had been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in a way inconsistent with the encumbrance so created.

Constructive notice.

2. Constructive notice in its nature is no more than evidence of notice, the presumption of which is so violent, that the court will not even allow of its being controverted (d), unless by the most convincing evidence to the contrary.

What amounts to constructive notice depends on the circumstances of the case.  
*Jones v. Smith*.

It is by no means an easy matter to say what amounts to constructive notice; for much depends upon the circumstances of each particular case. In the case of *Jones v. Smith* (e), Wigram, V.C., states the law on the subject with great clearness. The facts of that case were as follows:—A person before advancing money on a mortgage, inquired of the intending mortgagor and his wife whether any settlement had been made upon their marriage, and was informed that a settlement had been made, but of the wife's fortune only, and that it did not include the husband's estate,—the only property which was proposed as a security. He then advanced the mortgage money, without having seen the settlement or knowing its contents. *Held*, that the mortgagee

(b) Sugd. V. & P. 755.

(c) L. R. 3 Ch. 488.

(d) *Plumb v. Fluit*, 2 Anst. 438; *Henderson v. Graves*, 2 E. & A. 9.

(e) 1 Hare, 55.



was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate. It is scarcely possible to declare *à priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for present purposes, assert that the cases in which constructive notice has been established resolve themselves into two classes. Firstly, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiring, for the very purpose of avoiding notice,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts, which the *res gestæ* would suggest to a prudent mind, but if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply; the purchaser will, in equity, be considered, as in fact he is, a *bonâ fide* purchaser without notice." As an illustration of the first part of the rule, may be cited the case of *Bisco v. Earl of Banbury* (*f*). In that case, a person purchased with actual notice of a specific mortgage; the deed creating the mortgage

Constructive notice of two kinds.

1. Where actual notice of a fact, which would have led to notice of other facts.

2. Where inquiry purposely avoided to escape notice.

Mere want of caution not constructive notice.

(*f*) 1 Ch. Ca. 287; and disting. *Allen v. Seckham*, W.N. 1879, p. 85.

referred to other encumbrances. *Held*, that the purchaser, knowing of the mortgage, ought to have inspected the deed, and that would have led him to a knowledge of the other deeds, and in that way the whole case must have been discovered by him (g). As an illustration of the second part of the rule, may be cited the case of *Birch v. Ellames* (h). There the title-deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years after, upon the eve of the bankruptcy of the mortgagor, took a mortgage; he had notice of the deposit with the plaintiff, but avoided inquiring the purpose for which it was made. The court decreed for the plaintiff (i).

Inquiry after  
title-deeds  
must be made.

But the mere absence of title-deeds has never been held sufficient *per se* to affect a person with notice, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse (e.g., that the wife made jelly covers of them) has been given for the non-delivery of them; for in that case the court cannot impute fraud or gross and wilful negligence to him (j). But the court will impute fraud or gross and wilful negligence to a person dealing respecting an estate, if he omits all inquiries as to deeds (k).

Notice to  
agent, &c.,  
notice to prin-  
cipal.

It is clear that notice to an agent, attorney, or counsel for the purchaser is (for certain purposes at least) constructive notice to his principal. And the same rule applies if the same agent be concerned for both vendor and purchaser in the same transaction, even if the

Notice must  
have been in  
same transac-  
tion.

---

(g) *Ware v. Egmont*, 4 De G., M. & G. 473.

(h) 2 Anstr. 427.

(i) *Whitbread v. Jordan*, 1 Y. & C., Ex. Ca. 303.

(j) *Allan v. Knight*, 5 Hare, 272; *Hewitt v. Loosemore*, 9 Hare, 449; *Spencer v. Clarke*, 9 Ch. Div. 137.

(k) *Worthington v. Morgan*, 16 Sim. 547. But distinguish *Lee v. Clutton*, *supra*.

agent himself be the vendor (*l*). However, notice to counsel, agents, or solicitors, in order to affect in equity their employers, must have been given or imparted to them in the same transaction; for, if the law were otherwise, it would make purchasers' and mortgagees' titles depend on the memory of their counsel or agents. Where, however, one transaction is closely followed by and connected with another, or where it is clear that a previous transaction must have been present to the mind of the solicitor or counsel when engaged in another transaction, there the second transaction is to all intents and purposes one and the same transaction. This subject was fully considered by Wigram, V.C., in the important case of *Fuller v. Bennett* (*m*). There, after the commencement of a treaty for the sale of an estate by A., and the purchase of it by B., A. agreed to give C. a mortgage on the estate, as a security for an antecedent debt, and notice of the agreement with C. was given to the solicitors of B., the purchaser. The treaty for the sale by A. to B. afterwards ceased to be prosecuted for five years; and many things of course happened in the meantime. A. then died, and B. purchased the estate at a lower price from the heir and devisee of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B., from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage. It was held, under the circumstances of the case, that B. and D. had, through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage. In the judgment his lordship thus succinctly lays down the general rules: "The general propositions,—first, that notice to the

---

(*l*) *Le Neve v. Le Neve*, 2 L. C.; *Spencer v. Topham*, 2 Jur. N.S. 865; *Saffron Walden Building Society v. Rayner*, 10 Ch. Div. 696.

(*m*) 2 Hare, 394.

solicitor is notice to the client; secondly, that where a purchaser employs the same solicitor as the vendor, he (the purchaser) is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser, in the transaction in which he is so employed; and thirdly, that the notice to the solicitor, which will alone bind the client, must be notice in that transaction in which the client employs him,—have not, as general propositions, been disputed at the bar.” Finally, in order to affect a person with a constructive notice of facts within the knowledge of his solicitor, it is necessary not only that the knowledge should be derived from the same (or what is practically the same) transaction, but the knowledge *must be material to that transaction, and such as it was the duty of the agent to communicate to his principal*. See *Wyllie v. Pollen* (n), where it was held by Lord Westbury, C., that the transferee of a mortgage would not be affected by the knowledge of the solicitor acting for him in the transfer of an encumbrance subsequent to the original mortgage, so as to prevent him making further advances, such knowledge not being material to the business of the transfer. And of course this limit to the rule is only reasonable; in fact, the court very much dislikes this third variety of constructive notice, and the person who relies upon it must prove it very strictly.

5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Equity aids the vigilant, not the indolent; in other words,—Delay defeats equities.

These three maxims may be viewed as together illustrating the great distinctive and governing principle of equity, that nothing can call forth a court of

---

(n) 32 L. J. (Ch.) N.S. 782; and see *Bradley v. Riches*, 9 Ch. Div. 212.

equity into activity but conscience, good faith, and personal diligence.

5. As an illustration of the maxim, "He who seeks equity must do equity," may be briefly noticed the rules which govern what is termed a married woman's "equity to a settlement." The general rule is that when a *feme sole* marries, her property (not being settled to, or otherwise belonging to her for, her separate use), subject to certain conditions, passes to her husband; all her choses in action which the husband can reduce into possession, without the aid of a court of equity, and also all her things in possession, he may realise; but the moment he is obliged to ask the assistance of equity for that purpose, the court will only aid him on conditions. If, for instance, a testator bequeaths a legacy to a married woman, her husband can only realise the legacy through a court of equity. The moment the husband comes into court to claim it, the court will tell him, "We will help you to get all the money, only on condition that you make a fair settlement out of it for the benefit of your wife and children" (o).

5. He who seeks equity must do equity.  
Married woman's equity to a settlement.

Another illustration of the same maxim is, where a person having a title to an estate stands by and knowingly suffers a person ignorant of his title to expend money upon the estate, either in buildings or in other improvements, and then afterwards asserts his title in a court of law. Upon proving his title, judgment would, of course (subject to the recent changes), be given for him without any compensation for the improvements executed by the defendant. In equity, however (and consequently, now also in a court of law), a person who had expended money under such

Person standing by must give compensation. \*

circumstances on the estate of another would be entitled to be indemnified for his expenditure, either by pecuniary compensation, or otherwise in some cases, *e.g.*, if he were a lessee under a defective lease, by a confirmation of his title (*p*).

Compensation  
in cases of  
specific per-  
formance.

The maxim is also frequently illustrated in that class of cases where, in consequence of some misdescription in the property sold, a court of equity will not enforce specific performance of the contract at the suit of the vendor, unless he (the vendor) makes compensation to the defendant for the injury sustained by the latter from the misdescription (*q*), and so conversely, if the purchaser seeks to profit by any such misdescription.

6. He who  
comes into  
equity must  
come with  
clean hands.

6. As an illustration of the second of the three kindred maxims, viz., "He who comes into equity must come with clean hands," may be cited *Overton v. Banister* (*r*), in which this maxim received a very pointed illustration. There an infant, fraudulently concealing his age, obtained from his trustees part of a sum of stock to which he was entitled on coming of age; and when of age, a few months after, he applied for and received the residue of such stock. Then afterwards a suit was instituted to compel the trustees to pay over again the portion of stock improperly paid during minority; but the court held that the concealment of age was a fraud on the part of the infant, and neither himself nor his assignees were allowed to enforce repayment by the trustees of the stock paid during the minority (*s*).

---

(*p*) *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Powell v. Thomas*, 6 Ha. 300.

(*q*) *Knatchbull v. Greuber*, 1 Mad. 153; *Hughes v. Jones*, 3 De G., F. & J. 307.

(*r*) 3 Hare, 503.

(*s*) *Savage v. Foster*, 9 Mod. 35; *Nelson v. Stocker*, 4 De G. & Jo. 458, 464.

The rule must be understood to refer of course to wilful misconduct in regard only to the matter in litigation, and not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern (*t*).

7. The doctrine expressed in the third of the three connected maxims, viz., "Delay defeats equities," or (as it is otherwise expressed) "Equity aids the vigilant, not the indolent," may be briefly summed in the language of Lord Camden in *Smith v. Clay* (*u*):—"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence" (*v*). And it may be added, that even a comparatively short period of delay, not satisfactorily accounted for, also tells heavily against a plaintiff in equity.

7. Delay defeats equities.  
Vigilantibus non dormientibus, æquitas subvenit.

8. *Equality is equity*, or equity delighteth in equality.—This maxim has a very large application in many branches of equity; but it is perhaps nowhere so clearly illustrated as in the case of joint purchases and mortgages. If two persons advance and pay the purchase-money of an estate in equal portions, and take a conveyance to them and their heirs, it constitutes a joint-tenancy at law, that is, a purchase by them jointly of the estate with the chance of survivorship; and, of course, on the death of one, the survivor will take the whole estate. That is the rule not only at law, but also in equity as a general rule. But

8. Equality is equity.  
Equity leans against joint-tenancy.

(*t*) Sm. M. 23.

(*u*) 3 Bro. C. C. 640, note.

(*v*) *Wright v. Vanderplank*, 2 K. & J. 1, 8. De. G., M. & G. 133; *Laver v. Fielder*, 32 Beav. 1; *Strange v. Fooks*, 4 Giff. 408.

Purchase-money  
advanced in  
unequal  
shares.

wherever circumstances occur which a court of equity can lay hold of to prevent a survivorship, the court will readily do so; for joint-tenancy is not favoured in equity. Thus, in *Lake v. Gibson* (*w*), it was laid down, that where two or more purchase lands, and advance the purchase-money in *unequal* shares, and this appears on the deed itself, the mere circumstance of the inequality in the sums respectively advanced makes them in the nature of *partners*; and however the legal estate may survive, yet the survivor will in equity be considered as a trustee for the other, in proportion to the sum advanced by him, and of course a trustee also for himself in proportion to his own original share. "Where the parties advance the money *equally*, it may fairly be presumed that they purchased with a view to the benefit of survivorship; but where the money is advanced in *unequal* proportions, and no express intention appears to benefit disproportionately either of them, or especially the one advancing the smaller proportion, it is fair to presume that no such intention existed" (*x*). So, again, if two persons advance a sum of money, in equal or unequal shares, by way of mortgage, and take the mortgage to them jointly, and one of them dies, the survivor shall not in equity have the whole money due on the mortgage; but the representative of the deceased mortgagee shall have his proportion as a trust; for the mere circumstance that the transaction is a loan (and not a purchase) repels the presumption of an intention to hold the mortgage as a joint-tenancy (*y*), as there could have been no original intention by such a transaction to eventually acquire the land itself.

Money  
advanced on  
mortgage,—in  
equal or in un-  
equal shares.

9. Equity looks  
to the intent  
rather than to  
the form.

9. Equity looks to the intent rather than to the form.—Although this principle, even before the recent

*w* 1 L. C. 198.

(*x*) Sugd. V. & P. 697, 1 L. C. 205.

(*y*) *Rigden v. Vallier*, 2 Ves. Sr. 258; *Morley v. Bird*, 3 Ves. 631.



fusion of law and equity, was fully recognised in the common law, yet it was in equity that it received its complete exemplification. Equity would in no case permit the veil of mere form to hide the true bearings of a transaction. Thus it is a well-known rule that equity will relieve against a penalty or a forfeiture, unless in exceptional cases, *e.g.*, the case of landlord and tenant; if, therefore, it is satisfied that the sum of money specified in a bond is penal, it will refuse to enforce payment thereof in full, even though the parties may state in the bond in express words that the specified sum is not by way of penalty, but is to be held as the ascertained or "liquidated damages" for breach of the condition of the bond. To this maxim may be referred also the equitable doctrines that govern mortgages, and nowhere, perhaps, more than in these was the ancient divergence of equity from common law so strongly and clearly exhibited (z).

Relief against penalties and forfeitures.

10. "Equity looks on that as done which ought to have been done."—The true meaning of this maxim is, that equity will treat the subject-matter of a contract, as to its consequences and incidents, in the same manner as if the act contemplated by the parties had been completely executed. But equity will not thus act in favour of all persons, but only in favour of a limited class of persons, chiefly purchasers for value, whom equity regards with considerable affection. Thus, all agreements are considered as performed, which are made for a valuable consideration, in favour of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been done. They are also deemed to have the same consequences attached to them: so that no party to these agreements or his privy shall derive benefit from his own

10. Equity looks on that as done which ought to have been done.

Equitable conversion.

laches or neglect to complete same; and the other party or his privy shall not suffer thereby. Thus, money by deed covenanted, or by will directed, to be laid out in land, is treated as already land in equity, from the moment that the deed and will respectively take effect. And, on the other hand, where land is by agreement contracted, or by will directed, to be sold, it is considered and treated as money. This maxim will be fully exemplified under the head of Equitable Conversion, hereinafter considered.

II. Equity imputes an intention to fulfil an obligation.

II. "Equity imputes an intention to fulfil an obligation."—Where a man is bound to do an act, and he does one which is capable of being considered as done in fulfilment of his obligation, it shall be so construed, because it is right to put the most favourable construction on the acts of others, and to presume that a man intends to be just before he is generous (*a*). Thus if, on his marriage, a husband covenants to pay to the trustees of the marriage settlement the sum of £2000, to be laid out in land in the county of D., and to be settled upon the trusts of the settlement; and if the husband never pays the money to the trustees, but soon after the marriage he does in fact himself purchase land in the specified county, and takes a conveyance thereof to himself in fee, and then dies intestate, without bringing the lands into, or showing any [other] the slightest intention of settling them upon the trusts of the settlement,—there, the purchased lands will be considered as purchased by the husband in pursuance of his covenant, and will be liable to the trusts of the settlement (*b*). Under this maxim the doctrines of satisfaction and performance in equity, and which are both hereinafter considered, find their places.

(*a*) 2 Sp. 204.

(*b*) *Sowden v. Sowden*, 1 Bro. C. C. 582.

## PART II.

*THE EXCLUSIVE JURISDICTION.*

## CHAPTER I.

## TRUSTS GENERALLY.

PREVIOUSLY to the reign of Henry VIII., when the Statute of Uses was passed, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee-simple in the lands. The courts of law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable—just as a gift of money or goods, made without any consideration, is, and has ever been, if accompanied by delivery of possession, quite beyond the power of the giver to retract. In law, therefore, the person to whom a gift of lands was made, and seisin thereof delivered, was considered thenceforth to be the true owner of the lands (a). About the close of the reign of Edward III., a new species of estate unknown to the common law sprung into existence. The Statutes of Mortmain had prohibited lands from being given for religious purposes. In order to evade the stringency of these statutes, the lawyers (true to their constant habit) hit upon a means of evading them, the device being that of taking grants to third persons to

Feoffment,  
with livery of  
seisin.

Uses arise  
temp. Edw.  
III.

---

(a) William's Real Property, 152.

Chancellor's  
jurisdiction  
over the  
conscience.

Uses not re-  
cognised at  
common law.

*the use* of the religious houses (*b*). In process of time such grants or (speaking more properly) feoffments to one person to the use of another became usual even where no question of religion entered, and these uses, though alien to the common law, took root in the equity jurisprudence under the favouring influence of the Chancery, and even attained to a degree of influence and importance which eventually almost superseded the ancient common law (*c*). In law, the person, and he only, to whom a gift of lands was made and seisin delivered, was considered the owner of the land. In equity, however, this was not always the case; for the Chancellor, in the exercise of his jurisdiction over the conscience, held that the mere delivery of the possession or seisin to a feoffee was not at all conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed. Equity was unable, it is true, to take from him the title which he possessed at law, because equity (as we have seen) never sets aside, however much it may avoid, the law; but equity could and did compel him to make use of his legal title for the benefit of the persons who had the better claim to the benefit thereof. Thus, if A. conveyed land to B. to the use of C., this declaration of the use charged the *conscience* of B., the legal feoffee or grantee, but did not attach to the very *land* itself. If, therefore, B. refused to account to his *cestui que use* [*i.e.*, he to whose use the property was conveyed, viz., C.] for the profits, or wrongfully conveyed the estate to another than C., this was a breach of confidence on the part of B., but one for which the common law gave no redress, not recognising C. at all, but only B., as owner of the land. To B., and to B. alone, attached the privileges and the liabilities of a landholder; for *he* it was to whom the possession was legally delivered. It was accordingly decided at a very early period (*d*), that the courts of common law had no juris-

(b) 2 Bl. Com. 328.

(c) Hayes' Intro. 33.

(d) 4 Edw. IV.

diction whatever in regard to such uses as that in favour of C. But means were soon devised for compelling B., the owner in point of law, to keep good faith towards C., the owner in point of conscience. The king, in his Court of Chancery, assumed a jurisdiction to extort a disclosure from B. upon his oath of the nature and extent of the confidence reposed in him, and to enforce a strict discharge of the duties of his trust. Hence equity arose. From the period when the right of C. became cognisable in the Court of Chancery, he became in fact the equitable or true and beneficial owner, and B. became merely the legal owner. But the Court of Chancery, in assuming jurisdiction over the use, left untouched and inviolate the ownership at the common law, because, in fact, as we are always saying, equity never could, nor can, upset (however much it may avoid) the law. The Court of Chancery exercised no direct control over the land, but exercised control over the person of the legal owner, and coerced him if he obstinately resisted its authority. It will be seen, therefore, that, by the introduction of the device of uses, many of the rules of property were virtually defeated; and that the clergy, *e.g.*, who were prohibited by law from acquiring land, could, notwithstanding, acquire all the benefit thereof. Likewise, the factious baron might vest his estate at law in friends, and afterwards commit treason with impunity; and the ordinary proprietor, adopting the same precaution, might enjoy and also dispose of the beneficial interest, regardless of his lord and regardless also of the common law (*e*). It is not, indeed, suggested, although some writers have suggested, that these opportunities were abused; it is merely stated that the opportunities for abuse existed. But the legitimate advantages arising from the use were very great; and among the benefits so conferred upon the landowner, the power of disposing of his

Uses recognised in equity.

Equity recognised also the rules of law.

Opportunities for the abuse of the use.

---

(e) Hayes' Intro. 34, 35.

lands by will, a power that is properly incident to ownership, was one of the most valuable and important. The land itself, it is true, was not yet devisable, but the use of the land was so; and the legal owner was bound in equity to observe the testamentary destination of the use (*f*).

Statute of  
Uses, 27 Hen.  
VIII. c. 10,—  
converted the  
use into the  
legal estate,  
*i.e.*, land at  
law.

The inroads which uses had made, and were still making, on the ancient law of tenure, at length induced the Legislature to pass a statute for their regulation, viz., the famous Statute of Uses (*g*). By this statute it was enacted, that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that *have* any such use, confidence, or trust (by which were meant the persons beneficially entitled), shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have the use, trust, or confidence. In other words, the *use* became converted into the *land*; the use by virtue of the statute was the land. The result of this enactment will be best seen in one or two examples. Suppose a feoffment made to A. and his heirs, and the seisin duly delivered to him. If the feoffment is expressed to be made to A. and his heirs, to the use of B. and his heirs, A., who would before the statute have had an estate in fee-simple at law, now takes no permanent estate, but is by virtue of the statute a mere conduit pipe for conveying the estate to B. For B., who would before have had the use, shall now, having the use, be deemed in lawful seisin and possession of the lands—in other words, shall have the land, not only the beneficial interest, but also the fee-simple estate at law, which is wrested from A. by virtue of the statute. Again, suppose a feoffment to be made by X. to A. and his heirs simply, without

1. Express use.

(*f*) Hayes' Intro. 36.

(*g*) 27 Hen. VIII. c. 10.

any consideration. Before the statute, X., the feoffor, would, in this case, have been held in equity to have the use, for want of any consideration to pass it to the feoffee; therefore, after the statute, X., the feoffor, having the use, shall be deemed in lawful seisin and possession of the land; and, consequently, by such a feoffment, although livery of seisin is duly made to A., yet no estate will pass to A.; for the moment A. obtains the estate, he holds it to the use of X., the feoffor, and the same moment instantly comes the statute and gives to the feoffor, who has the use, the seisin and possession also. The feoffor, X., therefore, instantly gets back all that he gave, and the use is said to *result* to himself (*h*); so much so, that X. is held to be *in* again of his old estate,—the intervening feoffment, with all its heavy formalities, reckoning for nothing.

With regard to the question, What is a sufficient consideration? it was anciently the rule, even in equity, that a consideration, however trifling, given by the feoffee, was sufficient to entitle him to retain for his own benefit absolutely the lands of which he was enfeoffed (*i*); although the entire absence of any consideration caused the use or beneficial ownership to result or to revert to the feoffor. But the Court of Chancery at the present day takes a different view, and will not grant or withhold its aid merely according as there is or not a merely trifling and nominal consideration, *e.g.*, the customary five shillings' consideration; thus, circumstances of fraud, mistake, or the like, may induce the Court of Chancery to order the grantee, under a voluntary or practically voluntary conveyance, to hold merely as a trustee for the grantor: and it may be stated even more strongly than that, because, in fact, when the consideration is either absent or merely nominal, the *onus* is upon the grantee to prove

2. Resulting use.

The consideration required to rebut a resulting use.

(*h*) 1 Sand. Us. 99, 100.

(*i*) 1 Sand. Us. 59, 62.

the intention of a beneficial gift to him, and failing such proof, the grantor enjoys the benefit, although the estate at law may continue vested in the grantee. This is not contrary to that other doctrine of the courts of equity, hereinafter spoken of, that the mere want or inadequacy of valuable consideration is not a sufficient cause for interference (*j*).

Statute of  
Uses,—failure  
of its object.

No use upon  
a use at law.

The object of the enactment was completely to extirpate the doctrine of uses and trusts; we shall, however, see that the statute, so far from effecting that object, rather gave a fresh stimulus to the system it was intended to destroy. The statute aimed at rendering uses innoxious, by turning them into legal estates; but the common-law judges determined that if A., the legal owner of the land, was directed to hold the land to the use of B., who was directed to hold it to the use of C., the statute would carry the land to B. at law, but carry it no further, however plainly the intention might appear that the use or benefit was really designed for C. The ultimate use in favour of C. was “a use upon a use,” *i.e.*, a second use upon or after a first use, which second use the statute, having (in the opinion of the courts of common law) exhausted itself over the first use in favour of B., had no remaining energy to reach (*k*). It is scarcely necessary to point out, that the opinion of the courts of common law, although generally declared illiberal and narrow, was strictly right according to the accepted rules for the interpretation of statute law; and, in fact, many advantages have arisen from it. And among these advantages the line of demarcation between the legal and the equitable ownership was drawn broadly and unmistakably. In order to create, after the passing of the statute, an interest purely equitable, nothing more was necessary than to

---

(*j*) *Coles v. Trecothick*, 9 Ves. 246.

(*k*) *Lloyd v. Passingham*, 6 B. & C. 305; *Hayes' Intro.* 53.



declare a second use. Suppose, for example, that A. sold land to B., and B. desired to have the legal estate vested in C., in trust for B., the object was effected by A.'s conveying the land to B. to the use of C., to the use of, or, as we should now express it, in trust for, B. Here the land passes by the conveyance to B. under the old law, and the use in favour of C. carries the land to C. by virtue of the statute; and the beneficial and only substantial use being once more received into the bosom of equity, B. was there acknowledged as the beneficial owner (*l*), that is to say, the equitable owner. Hence the equitable jurisdiction.

We have now arrived at a very prevalent and important kind of interest, namely, an estate in equity merely, and not at law. The owner of such an estate had (prior to the recent fusion of law and equity) no title at all in any court of law, but must have had recourse exclusively to the Court of Chancery.

The word *trust* is never employed in modern conveyancing when it is intended to vest an estate in fee-simple in any person by force of the Statute of Uses. Such an intention is always carried into effect by the employment of the word *use*; and the word *trust* is reserved to signify a holding by one person for the benefit of another, similar to that which before the statute was called a use (*m*). Trust distinguished from use,—for convenience only.

In the construction and regulation of trusts, equity is said to follow the law; that is, the Court of Chancery generally adopts the rules of law applicable to legal estates. Thus a trust for A. for his life, or for A. and the heirs of his body, or for A. and his heirs, will respectively give A. an equitable estate for life, an equitable estate in tail, or an equitable estate in fee-simple. Again, an equitable estate in fee-simple Equity follows the analogy of the law,—as regards equitable estates.

---

(*l*) Hayes' Intro. 53.

(*m*) Wms. R. Prop. 156; 1 Sand. Us. 278.

immediately belongs to every purchaser of freehold property the moment he has signed a contract for its purchase. If, therefore, the purchaser were to die intestate, the moment after a contract is completed as a contract simply, the equitable estate in fee-simple which he had just acquired would descend to his heir-at-law, and the vendor would be a trustee for such heir, and would also be compellable to make a conveyance of the legal estate to the heir (*n*).

Property to which the Statute of Uses is inapplicable.

Not only the refusal of the common law to recognise a use upon a use,—a refusal depending, as we have seen, upon the construction of the Statute of Uses,—but a further question of construction which arose on the statute, and which the courts of law construed in the like spirit (correct, but in appearance narrow and illiberal), tended to very much limit the application of the statute. The Statute of Uses, it will be observed, was pointed at the extirpation of uses of lands, tenements, and hereditaments only, and therefore it extended not to other species of property; and further, it will also be observed, as the statute spoke, in the case of lands, &c., only of persons “*seised*” of lands, &c., to the use of another or others, and seisin strictly so called applied and applies to freeholds only, and neither to leasehold nor to copyhold lands, it followed that the statute was confined in its legal operation to freehold lands. Consequently, the properties to which the Statute of Uses does not apply at law are much more numerous than the properties to which it does apply at law, and may be enumerated as follows:—

1. Pure personal property generally.
2. Impure personal property; otherwise chattels real; or leasehold lands; and
3. Copyhold lands (*o*).

---

(*n*) See Wms. R. Prop. 160, 161.

(*o*) 2 Ves. Sr. 257; 1 Sand. Us. 249.

Thus, with regard to all these three classes of properties, if any of them was vested in A. to the use of B., the statute was held not to transfer the legal interest to B., which therefore remained in A. at law, and B.'s use underwent no change except a change of name, for it was now called, in conformity with the style adopted in regard to freehold interests, a *trust* (*p*). And generally, with regard to trusts of all these three classes of property, the rules to be applied after the statute were the same that they were subject to before the statute. And as to freeholds even, only uses of a certain description were operated on by the statute. The only uses to which the statute applied were *passive* uses; for in regard to active uses, being uses which impose (as the name denotes) some active duties on the feoffee, *e.g.*, to sell the land and divide the money, or to pay debts, &c., the statute was necessarily inoperative (*q*).

The next important statute that has a bearing upon trusts is the Statute of Frauds (*r*). Before that statute, trusts of every species of property might have been created, or might have been passed from one person to another, without any writing, and without the use even of any particular form of words. But in consequence of the danger of permitting the often complicated directions of a trust to depend upon so uncertain a thing as memory, and generally to shut the door against the numerous frauds that might otherwise have entered under the pretext of simplicity, the Legislature thought fit to enact that certain species of trusts should be in writing. By the Statute of Frauds it was accordingly enacted as follows:—

Statute of  
Frauds,—  
trusts originally  
created  
by parol, re-  
quired hence-  
forth in general  
to be created  
by writing.

Sec. 7. That all *declarations* or *creations* of trusts or

---

(*p*) Gilb. Us. 79.

(*q*) Hayes' Intro. 51.

(*r*) 29 Car. II. c. 3.

confidences, of any *lands, tenements, or hereditaments*, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing.

*N.B.*—The party here referred to as by law enabled to declare the trust, is of course the beneficial owner (*s*).

Sec. 9. That all *grants and assignments* of ANY trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by his last will.

Exceptions. Sec. 8. recognises two exceptions from the statute, viz.—

(*a.*) Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law; and,

(*b.*) Trusts transferred or extinguished by act or operation of law.

Property to which the Statute of Frauds is applicable.

It is clear that the last-mentioned statute extends to freehold lands; it has been decided that copyhold lands (*t*), and also leasehold lands or chattels real (*u*), are likewise within the Act, but that pure personal estate, *i.e.*, chattels personal, are not within the Act (*v*). But so far as regards chattels personal, all that the court has ever decided is, that they are not within the 7th section (which treats of the declaration or original creation only of a trust); and it is the editor's opinion, that chattels personal are within the 9th section (which treats of the grant, *i.e.*, the assignment, of an already created and subsisting trust).

---

(*s*) *Kronheim v. Johnson*, 7 Ch. Div. 60.

(*t*) *Lewin Tr.* 43; *Withers v. Withers*, Amb. 151.

(*u*) *Forster v. Hale*, 3 Ves. 696; *Riddle v. Emerson*, 1 Vern. 108.

(*v*) *M'Fadden v. Jenkins*, 1 Ph. 157; *Benbow v. Townsend*, 1 My. & K. 506.

A trust, as will be seen from the instances above given, is a beneficial interest in, or a beneficial ownership of, real or personal property unattended with the legal ownership thereof (*w*). Definition of trust.

Trusts may be classified under three heads: *express trusts*, *implied trusts*, and *constructive trusts*. Those falling under the first of these three heads may be again subdivided, according to their objects, or their end and purpose, into *express private trusts* and *express public [or charitable] trusts*. Trusts implied and constructive, being the trusts falling under the second and third heads, are frequently confounded, or at least classed together, and it is not always easy to draw the line between them. It is proposed in the succeeding chapters to treat of each head or class of trust in the order above enumerated. Classification of trusts,—  
express, im-  
plied, and con-  
structive.

## CHAPTER II.

## EXPRESS PRIVATE TRUSTS.

Express trusts. AN express trust is a trust which is clearly expressed by the author thereof, whether verbally or by writing. Express trusts are of many varieties, which it is proposed to expound in order one after another.

1. *Executed or executory.* Firstly, An express trust may be either *executed* or *executory*. A trust is said to be executed when no act is necessary to be done to give effect to it, the trust being finally declared by the instrument creating it; as where an estate is expressed to be conveyed to A. in trust for B., and the conveyance actually accomplishes what it professes to do. On the other hand, a trust is executory when there is a mere direction to convey upon certain trusts, and the instrument containing the direction to convey does not of itself, *proprio vigore*, effect the conveyance which it directs. "All trusts," observes Lord St. Leonards, "are in a sense executory, because there is always something to be done. But that is not the sense which a court of equity puts upon the term 'executory trust.' A court of equity, in considering an executory trust as distinguished from a trust executing itself, or executed trust, distinguishes the two in this manner—Has the testator been what is called, and very properly called, his own conveyancer? Or has he, on the other hand, left it to the court to make out from *general expressions* what his intention is. If he has so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert

them into legal estates, then the trust is executed ; but, otherwise, it is executory " (a).

In the case of trusts executed, a court of equity will put the same construction on technical words as is put by a court of law on limitations of legal estates. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of the body of A., the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail (b); and to this rule, it is believed, there is no exception whatsoever. On the other hand, in the case of an executory trust, that is to say, a trust raised either by stipulation or direction in express terms, or by necessary implication, to make a settlement or assurance to uses or upon trusts which are indicated in, but not finally declared by, the instrument containing such stipulation or direction, as in the case of marriage articles, and as in the case of a will where property is vested in trustees to settle or convey in a more perfect and accurate manner, in both which cases a further act—viz., a settlement or a conveyance—is contemplated, then in these and the like cases a court of equity sometimes does, and sometimes does not, put the same construction on technical words as is put by a court of law on limitations of legal estates. It is unnecessary to say that the court of equity in thus acting, does not act capriciously or arbitrarily, but pursues with steadfastness certain rules or principles, which may be rendered easily intelligible. We shall endeavour to make them so; and, for that purpose, it is to be observed as follows:—

As to trusts executed,—equity follows the law.

As to trusts executory,—equity may or may not follow the law.

(a) *Egerton v. Brownlow*, 4 H. L. Ca. 210.

(b) *Jervoise v. D. of Northumberland*, 1 J. & W. 559.

Two guiding principles in executory trusts.

1. In cases of executory trusts, that is, where the trusts remain to be executed in the sense of perfect limitation above explained, a court of equity will not invariably construe the technical expressions in the document declaring the trust with legal strictness, but will occasionally execute the trusts, and, if necessary, mould them according to the intention of the creator of the trusts, even if that intention should be contrary to the strict legal effect of the language he has used. But if no such contrary intention can be collected, either from the instrument itself or from the nature of the case, a court of equity is bound to construe, and always does construe, the technical terms used in the instrument in strict accordance with their legal meaning (*c*).

2. There are two documents (and, it is believed, two documents only) in which executory trusts are found; and these documents are,—firstly, Marriage articles; and, secondly, Wills.

(*a.*) Marriage articles,—intention always implied.

Now, firstly, in marriage articles, the very object and purpose of these furnish in themselves an indication of intention. Their object is, of course, to make a provision for the issue of the marriage by a properly executed settlement, framed so as to carry out the clauses which the articles only imperfectly express; and it is not to be presumed that the contracting parties meant to put it in the power of either to defeat that purpose by limiting the estate to himself or herself absolutely. If, therefore, the agreement is to limit an estate for life to either or both of the contracting parties, with remainder to the heirs of the body or bodies of him, her, or them, the court decrees a strict settlement in conformity to the presumable intention. But, secondly, if a will directs the like limitation for life, with the like remainder to the heirs of the body, the

(*b.*) Wills,—intention requires to be expressed.



court has no such object or purpose necessarily before it as a ground for decreeing a strict settlement; and therefore, in the case of a will, it is not a matter of course, as it is in the case of marriage articles, to decree a strict settlement; and the court therefore does not invariably, but only occasionally, do so. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another—an estate for life rather than in tail or in fee. The testator's intention in respect of the quantity of interest to be given can be known only from the words in which it is expressed, or rather directed to be given; but if it is clearly to be ascertained from the words of the will that the testator did not mean to give that precise quantity of estate which the words of limitation, when construed in strict accordance with the rules of law, would in fact give, then the court will decree such a settlement as the testator appears to have intended, and will depart from his literal words in order to execute that intention (*d*).

Each branch of the subject must be considered separately from the other—Firstly, therefore, as to executory trusts in marriage articles:—

If in articles before marriage for making a settlement of the real estate of either the intended husband or the intended wife, or of both, it is agreed that the estate shall be settled upon the heirs of the body of them, or either of them, in such terms as would, if construed with legal strictness, according to the rule in *Shelley's case*, give both or either of them an estate tail, and enable both or either of them to defeat the provision for their issue, courts of equity, considering

Executory trusts under marriage articles,—  
(a.) Court will decree a strict settlement in conformity with presumed intention.

---

(*d*) *Blackburn v. Stables*, 2 V. & B. 369; *Deerhurst v. St. Albans*, 5 Mad. 260.

the object of the articles, viz., to make provision for the issue of the marriage, will, in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail as purchasers. Thus, in *Trevor v. Trevor* (e), A., in consideration of a then intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs male of him on her body begotten, and the heirs male of such heirs male issuing, remainder to the right heirs of the said A. for ever:—Lord Macclesfield said that upon articles the case was stronger than on a will; that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled when they came to be carried into execution as to make them effectual; and that the intention was to give A. only an estate for life; that if it had been otherwise the settlement would have been vain and ineffectual, and it would have been in A.'s power as soon as the articles were made to have destroyed them. And his lordship therefore held that A. was entitled to an estate for life only, and that his eldest son took by purchase, as tenant in tail (f).

It is believed that, in the case of marriage articles (not expressly directing to the contrary), there is no instance in which a court of equity has decreed, or will decree, any settlement other than a strict settlement like that decreed in *Trevor v. Trevor*, *supra*.

(b.) Executory trusts in wills,  
—Court seeks for the expressed intention.

Secondly,—As to executory trusts in will—

The intention of the testator must appear from the

---

(e) 1 P. W. 622.

(f) Affd. in H. of Lds. 5 Brown, P. C. Toml. ed. 122; *Streatfield v. Streatfield*, Ca. t. Talb. 176.

will itself that he meant "heirs of the body," or words of similar legal import, to be words of purchase, and not of limitation; otherwise, courts of equity will direct a settlement to be made according to the strict legal construction of those words.

Suppose, for instance, a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body; here, as no indication of intention appears that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail, although, as we have already seen, in the case of marriage articles similarly worded, he would have taken only an estate for life. Thus, in *Sweetapple v. Bindon* (g), B., by will, gave £300 to her daughter Mary, to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children, and if she died without issue, the land to be equally divided between her brothers and sisters then living. Lord Cowper said, that had it been an immediate devise of land, Mary the daughter would have been, by the words of the will, tenant in tail; and in the case of a voluntary devise, the court must take it as they found it, and not lessen the estate or benefit of the devisee, although upon the like words in marriage articles it might have been otherwise.

Construed strictly, in the absence of an expressed intention to the contrary,—*Sweetapple v. Bindon*.

On the other hand, if, for instance, there is a devise to trustees, upon trust to convey to A. for life, and after his decease to the heirs of his body, and in the will there are expressions from which it can be fairly inferred that the testator wanted a strict settlement of the lands devised, for example, either from the will mentioning the testator's desire that A. should marry, or from the testator expressing that A. (notwithstanding the apparent limitations aforesaid) should

Construed according to contrary intention,—if that is expressed,—*Papillon v. Voice*.

(g) 2 Vern. 536. And see the Rule in *Wild's case*, Tud. Conveyancing Cases, 3rd ed., 669.

not have power to bar the entail, or other like words, —then the court of equity will endeavour to effect that intention, and will decree a strict settlement to be for that purpose executed. Thus in the case of *Papillon v. Voice* (*h*), where A. bequeathed a sum of money to trustees in trust, to be laid out in the purchase of lands, *to be settled* on B. for life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over, *with power to B. to make a jointure*; [and by the same will, A. *devised lands* to B. for his life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over],—Lord Chancellor King declared, as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of B.,—this last remainder was in the general rule, and the words of it must operate as words of limitation, and consequently create a vested estate tail in B., and that the breaking into this rule would occasion the utmost uncertainty; but as to the other part, he declared that the court had power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it was only executory, and the party must come to the court in order to have the benefit of the will; that in the latter case the intention should take place, and not the rules of law; so that as to the lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over. And the reader

---

(*h*) 2 P. W. 471.

will have observed that, in the last-mentioned case, the already acquired lands devised by the will were so devised upon an *executed* trust,—so that the rule in Shelley's case could not but apply, as we have, in fact, already stated at the outset of this chapter; but that, in the same case, the lands *to be purchased*, and then afterwards *to be settled*, devised by the will were so devised upon an *executory* trust,—so that the court was free to apply (or not) to apply the rule in Shelley's case, according as it found (or did not find) in the will itself some reference to a marriage or other indication of an intention contrary to the strict construction of the words. Now, the reference to *jointuring* was a reference to marriage, and was also a sufficient reference for the court to act upon. That reference took, in fact, that particular portion of the will out of the category of devises altogether, and put it (in effect) into the category of [one-sided] marriage articles; and, of course, the usual consequences had to follow, as above expounded.

In the following further cases, it was held that there had been a sufficient indication of the testator's intention that the words, "heir of the body," or words of similar import, should be construed as words of purchase, and not of limitation, viz.,—where trustees were directed to settle an estate upon A. and the heirs of his body, taking special care that it should not be in the power of A. to dock the entail of the estate given to him during his life (*i*); or, again, "in such manner and form . . . as that, if A. should happen to die without leaving lawful issue, the property might then after his death descend unencumbered to B. (*j*); so also a direction that the settlement shall be made "as counsel shall advise" has been held to indicate an intention that there should be a strict settlement (*k*).

What expressions have been held to show a contrary intention.

(*i*) *Leonard v. Sussex*, 2 Vern. 526.

(*j*) *Thompson v. Fisher*, L. R. 10 Eq. 207.

(*k*) *Bastard v. Proby*, 2 Cox, 6.

II. *Voluntary trusts, and trusts for value.*

Secondly,—An express trust may be either a voluntary trust or a trust for valuable consideration. Preliminary to entering upon the subject of voluntary conveyances and trusts, it may be useful to lay down a few principles of general application to the subject.

General rules.  
1. *Ex nudo pacto non oritur actio.*

I. The principle of the maxim, *Ex nudo pacto non oritur actio*, is as universally recognised in English equity as at law. Thus, in *Jefferys v. Jefferys* (l), a father, who had by voluntary settlement conveyed certain freeholds, and covenanted to surrender [but had never actually surrendered] certain copyholds to trustees in trust for the benefit of his daughters, afterwards devised the same freehold and copyhold estates to his widow, by a will dated subsequently to Preston's Act, 1815 (55 Geo. III., c. 192), being the Act which first rendered a surrender to the uses of the will unnecessary. It followed from this that the will was completely effective not only as to the freehold lands, but also as to the copyhold lands, while the deed of voluntary settlement was completely effective as to the freeholds, but only incompletely effective as to the copyholds. A suit having been instituted by the daughters after the testator's death to have the trusts of the settlement carried into effect, and to compel the widow to surrender to them the copyholds to which she had meanwhile been admitted, the Lord Chancellor said,—“The title of the plaintiffs (the daughters) to the freeholds is complete; and being first in date, is also first in right. But with respect to the copyholds, I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court, to withhold its assistance from a volunteer, applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement” (m). Con-

(l) Cr. & Ph. 138.

(m) *Wilkinson v. Wilkinson*, 4 Jur. N. S. 47. 1

sequently, the widow kept the copyholds, but the daughters got the freeholds.

2. An imperfect conveyance is in equity regarded as evidencing a contract, binding or not binding as the case may be (*n*); and when this statement is resolved into its elements, it amounts to this—(1) An imperfect conveyance, if for valuable consideration, is binding; and (2) an imperfect conveyance, if voluntary, is not binding. And reading these principles backwards, they hold equally true; for (1) a conveyance for value is binding, although imperfect; but (2) a voluntary conveyance is not binding, if imperfect.

2. Imperfect conveyance,—evidence of a contract.

3. On the other hand, a voluntary conveyance may, of course, be perfect; and if perfect, it will be binding. In other words, a trust may be raised without any consideration. In *Ellison v. Ellison* (*o*), Lord Eldon says,—“I had no doubt that from the moment of executing the first deed, supposing it not to have been for wife and children, but for pure volunteers, these volunteers might have filed a bill in equity on the ground of their interest under the instrument. . . . I take the distinction to be that if you want the assistance of the court to *constitute* you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of *constituting* you *cestui que trust*” (*p*), implying that, if you are already completely *constituted*, then you are all right, and may enforce your rights under the deed.

3. Trust may arise without consideration.

It will be found, in fact, that all the cases which have been decided on voluntary trusts, whether in favour of or against the volunteers, have turned upon

Has relation of *cestui que trust* been constituted?

---

(*n*) *Parker v. Taswell*, 4 Jur. N.S. 183; 2 De G. & J. 559.

(*o*) 1 L. C. 271.

(*p*) *Jones v. Lock*, L. R. 1 Ch. 25.

the single inquiry,—Has the trust been completely constituted or declared? Because, if so, it is binding; and if not so, it is no good at all, even as a ground of action for completely constituting it. The inquiry is, however, sometimes one of the greatest nicety, depending on various considerations, which it is now proposed to examine.

I. Where donor is both legal and equitable owner.

I. Cases where the donor has the legal as well as the equitable interest in the property, which is the subject of contest.

(a.) Trust actually executed,—either (1) by conveyance or assignment upon trust, or (2) by donor's declaration of trust.

(a.) If the conveyance to the donee in trust for him be actually and effectually made, as if a person by a complete legal conveyance has transferred land or stock, no difficulty will arise, for then equity will enforce the trust even in favour of a volunteer against the author of the trust, and all subsequent volunteers (q). And the rule is the same, not only if the donor has effectually conveyed the property to trustees for the donee, but also where the donor, being legal and equitable owner of property, declares himself a trustee for the donee; a binding trust is thus created. The efficacy of a simple declaration of trust is laid down by Lord Eldon in the case of *ex parte Pye* (r), as follows: "It is clear that this court will not assist a volunteer,—that upon an agreement to transfer stock this court will not interpose. But if the party has declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it."

(b.) Trust not actually executed,—either (1) no declara-

(b.) It often happens, however, that the donor has not made or intended to make any declaration of trust properly so called, but has attempted to make a com-

(q) *Ellison v. Ellison*, 1 L. C. 273.

(r) *Ex parte Pye, ex parte Dubost*, 18 Ves. 140, 145.



plete legal conveyance or assignment, and has failed to do so. In considering the legal or equitable effect of such ineffectual attempts, it becomes necessary to draw the following distinctions, viz. :—

tion of trust, or (2) incomplete conveyance or assignment on trust.

(1.) If the property in such a case is of a species that admits of a complete conveyance or assignment at law, the donee will receive no aid from the court to perfect the apparently intended gift.

(1.) Of property assignable at law.

Thus, in *Antrobus v. Smith* (s), A. made the following endorsement upon the receipt for one of the subscriptions in the Forth and Clyde Navigation Company :—“I do hereby assign to my daughter B. all my right, title, and interest of and in the enclosed call, and all other calls in the F. and C. Navigation.” There was no evidence that A. had parted with the paper. *Held*, that no trust was created in favour of B. The Master of the Rolls said,—“But this instrument was of itself incapable of conveying the property. It is said to amount to a declaration of trust. Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. *He was not in form declared a trustee*, nor was that mode of doing what he proposed in his contemplation. He meant a gift. *He says he assigns the property*, but it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect. There is a *locus pœnitentiæ*, as long as it is incomplete.”

*Antrobus v. Smith*,—endorsement under hand only, and purporting to assign.

In *Searle v. Law* (t), A. made a voluntary assignment

*Searle v. Law*,

(s) 12 Ves. 39.

(t) 15 Sim. 95.

—non-compliance with the particular formalities required on an assignment.

of Turnpike Bonds and Shares in a Railway Company in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B., *but did not observe the formalities required by the Turnpike Road Act, and the deeds by which the Company was formed, to make the assignment effectual.* Held, on his death, that no interest, either in the bonds or in the shares, passed by the assignment, and that B. ought to deliver them to A.'s executors. The Vice-Chancellor said,—*"If that gentleman had not attempted to make any assignment of either the bonds or the shares, but had simply declared in writing that he would hold them on the same trusts as are expressed in the deed, that declaration would have been binding on him, and whatever bound him would have bound his personal representative. But it is evident that he had no intention whatever of being himself a trustee for any one, and that he meant all the persons named in the deed as cestui que trusts to take the provision intended for them through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment, and therefore both the legal and the beneficial interest in the bonds and shares remained vested in him at his death."*

(2.) Of property not assignable at law.

(2.) But if the property conveyed or assigned be not such that it may properly be transferred at law, the conveyance or assignment of it will be held good *if the donor has done all that he could to perfect the assignment.*

*Fortescue v. Barnett*,—policy of assurance, purported assignment of, by deed.

Thus in *Fortescue v. Barnett* (u), J. B. made a voluntary assignment by deed of a policy of assurance upon his own life for £1000 to trustees upon trust, for the benefit of his sister and her children if she or they should outlive him. The deed was delivered to one of

the trustees, but the grantor kept the policy in his own possession. No notice of the assignment was given to the Assurance Office, and J. B. afterwards surrendered, for valuable consideration, the policy and a bonus declared upon it, to the Assurance Office. Upon a bill filed by the surviving trustee of the deed to have the value of the policy replaced, the court held that, upon the delivery of the deed, no act remained to be done by the assignor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed. The Master of the Rolls said,—“In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the Assurance Office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor, which to assist a volunteer this court would not compel him to do. *I am of opinion, that no act remained to be done to complete the title of the trustees.*”

In *Edwards v. Jones (v)*, the obligee of a bond, five days before her death, signed a memorandum not under seal, which was endorsed upon the bond, and which purported to be an *assignment* of the bond without consideration to a person to whom the bond was at the same time delivered. *Held*, that the gift was incomplete, and that as it was without consideration, the court could not give effect to it. The Lord Chancellor said,—“The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be, whether the mere

*Edwards v. Jones*,—Bond purporting to be assigned by memorandum under hand only.

handing over of the bond . . . would constitute a good gift *inter vivos*; that is to say, whether the plaintiff would be entitled to the assistance of a court of equity for the purpose of carrying into effect the intention of the parties. Now, it is clear that this is a purely voluntary gift, and a gift which cannot be made effectual without the interposition of this court." (*w*).

*Pearson v. Amicable Society*,—policy of assurance,—purported assignment of, by deed.

The cases on this subject are in no sense conflicting, provided the distinctions taken above are borne in mind. The rules regulating the matter have been clearly enunciated and applied in the case of *Pearson v. Amicable Assurance Office* (*x*). There G. T. effected an assurance on his life with the Amicable Society. He then executed a voluntary settlement of the policy, assigning it to trustees to hold on the trusts of the voluntary settlement, and at the same time gave the trustee an irrevocable power of attorney. G. T. died, and the trustees claimed the amount from the company, but their claim was resisted by the executors, who gave notice to the office not to pay the amount to the trustees. The Assurance Company paid the money into Court. The Master of the Rolls said,—“The question is, whether this is a complete instrument, or whether it requires the assistance of a court of equity for its enforcement. I am of opinion that it is a complete and perfect instrument.”

Assignment of Policies, and legal choses in action.

It may here be observed that certain classes of property, not formerly assignable at law, have since the date of the foregoing decisions been made assignable at law (*y*); consequently, the distinction aforesaid

---

(*w*) *Blakely v. Brady*, 2 Dr. & Walsh, 311, and distinguish *Baddeley v. Baddeley*, 9 Ch. Div. 113.

(*x*) 27 Beav. 229.

(*y*) Policies of life assurance are assignable under 30 & 31 Vict., c. 144; policies of marine insurance under 31 & 32 Vict., c. 86; and debts and other legal choses in action generally under 36 & 37 Vict., c. 66, s. 25, sub-sec. 6.

between property that is, and property that is not, properly assignable at law, is for the future rendered unnecessary, and the question in all cases now is simply whether the property has been in fact completely assigned at law or only incompletely assigned at law.

II. Cases where the donor has only an equitable interest in the property assigned.

II. Where donor is only equitable owner.

(a.) In this case if the settlor directs trustees to hold the property in trust for the donee, though without consideration, a trust is well and irrevocably created (z). Such a direction must be in writing as regards lands; but it has been held that a direction by parol is sufficient to create a trust, as regards personal property. Thus, in *M-Fadden v. Jenkins* (a), A. sent a verbal message to his debtor B., desiring him to hold the debt in trust for C. B. accepted the trust, and acted on it by paying C. a small part of the trust-money. It was held, that a trust had attached to the property, and that the transaction amounted to the same thing, as if A. had declared himself, instead of B., a trustee of the debt for the plaintiff.

(a.) Trust actually executed, —either (1) by direction to trustees to hold on trust. Parol declaration of trust binds personally.

It does not now seem to be considered necessary to the validity of the creation of a trust by the beneficial owner of property, that there should be notice to, or an acceptance, or declaration of the trusts by, the trustees, in whom the legal interest is vested (b): notice is, however, necessary to protect the *cestui que trust* as against third parties (c).

Notice to trustees unnecessary except as against third parties.

(b.) Cases where, instead of giving directions to Or (2) by con-

(z) *Bill v. Cureton*, 2 My. & K. 503.

(a) 1 Ph. 153.

(b) *Tierney v. Wood*, 19 Beav. 330; *Donaldson v. Donaldson*, Kay, 711; *Kronheim v. Johnson*, 7 Ch. Div. 60.

(c) *Donaldson v. Donaldson*, Kay, 719.

veyance or  
assignment of  
equitable in-  
terest.

trustees to hold for the benefit of volunteers, the donor assigns his equitable interest without consideration to another.

Two groups of cases occur under this head :

- (1.) Lands,—equitable interest in ;
- (2.) Personalty,—equitable interest in.

*Gilbert v. Over-*  
*ton*,—Lands,  
assignment  
of equitable  
interest in, by  
*deed*.

- (1.) Lands,—equitable interest in :—

In *Gilbert v. Overton* (*d*), a settlor, holding an agreement for a lease, subject to rents and covenants, by voluntary deed, assigned all his interest to trustees, to hold upon the trusts thereby declared, and shortly afterwards took a lease under the agreement to himself. The legal estate was never assigned to the trustees. It did not appear, whether at the date of the settlement the settlor was entitled to call for an immediate lease. *Held*, that the settlement was complete, and ought to be carried into execution. In giving judgment, Lord Hatherley, then Vice-Chancellor, said,—"It appears to me there are several reasons for upholding the settlement. In the first place, it contains a declaration of trust, and that is all that is wanted to make any settlement effectual. The settlor conveys his equitable interest, and directs the trustees to hold it upon the trusts thereby declared. In the inception of the transaction, there is nothing to show that the settlor had the power of obtaining a lease before the time when he did so, after the execution of the settlement. There is, therefore, nothing to show that the settlor did not, by the settlement, do all that it was in his power to do, to pass the property. If this were not sufficient, it would be impossible to make a

voluntary settlement of property of this description" (e).

(2.) Personalty,—equitable interest in:—

As to personalty, there has been undoubtedly some uncertainty of opinion arising from the principle of the common law, only recently exploded by the Judicature Act, 1873; s. 25, sub-section 6,—“that choses in action are not assignable;” but since the case of *Kekewich v. Manning* (f), the doctrine laid down in *Meek v. Kettlewell* (g), which was supposed to conflict with the other cases, has been explained, and the weight of all recent authority tends to show that the rule in the case of equitable interests in personalty is the same as that which was pointed out with regard to equitable interests in realty in *Gilbert v. Overton* (h), viz., that the settlement will be upheld where the settlor has done all in his power to pass the property.

In *Kekewich v. Manning* (i), residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of her marriage, the daughter assigned her interest under the will to trustees upon trust for the issue of the intended marriage, and in default for a niece of the daughter, and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death. *Held*, that [even if the settlement was voluntary as regarded the

*Kekewich v. Manning*,—personal estate, equitable interest in, assignment of, by deed.

(e) But see *Bridge v. Bridge*, 16 Beav. 322.

(f) 1 De G. M. & G. 176.

(g) 1 Hare, 464.

(h) 2 H. & M. 116; May on Voluntary Conveyances, p. 409.

(i) *Ubi supra*.

trust in favour of the niece] it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement, against the daughter, and against the trustees of another settlement, which she made on a second marriage, inconsistent with the former settlement. Knight Bruce, L. J., said,—“To state, however, a simple case—suppose stock or money to be legally vested in A. as a trustee for B., for life, and subject to B.’s life interest, for C. absolutely; surely it must be competent to C., in B.’s lifetime, with or without the consent of A., to make an effectual gift of C.’s interest to D., by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?”

*Donaldson v. Donaldson*,—  
to same  
effect.

In *Donaldson v. Donaldson* (j), it was held, that a voluntary assignment of the assignor’s interest in a sum of stock standing in the names of trustees, such assignment being made by deed of trust in favour of volunteers, was a complete transfer of such interest, as between the donee and the representative of the donor, although no notice of the deed was given to the trustees in the donor’s lifetime. Wood, V. C., said,—“The question is, in every case where there has been no declaration of trust, Has the assignor performed such acts that the donee can take advantage of them, without requiring any further act to be done by the assignor, and if the title is so far complete, this court will assist the donee in obtaining the property from any person who would be treated as a trustee for him? . . . In this case there is no need whatever for the donee to call in aid the jurisdiction of this court against the original assignor or his representatives. All that they



have to do, is to require the trustees who hold the fund, to transfer it to them" (k).

The relation of trustee and *cestui que trust*, may be created in various ways, and we have seen that it may arise by simple writing under hand signed by the party declaring or directing the trust, or (but only as to pure personal estate) by mere word of mouth declaring or directing the same. And, further, as regards pure personal estate, it is not essential even that there should be any express declaration or direction of trust, but the intention of the donor to constitute himself a trustee, or to direct a third person to hold upon trust, may be gathered from the mere conduct of the party, or the facts and circumstances of the case. Thus, in the recent case of *Penfold v. Mould* (l), a married woman entitled to certain sums of stock and cash standing in court to her separate account, consented that the same should be transferred to her husband, and afterwards retracted her consent. It was there argued, and the argument was approved by the court, that such consent might constitute a valid declaration of trust; but on the whole case it was decided, that a trust had not been created, inasmuch as it was competent for a married woman to retract her consent at any time before the transfer was actually completed.

Donor's intention to constitute himself a trustee may be gathered from conduct, without any express declaration, as regards personal estate at least.

The law as to voluntary trusts is thus summarised by Lord Justice *Turner* in *Milroy v. Lord* (m): "In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement bind-

*Milroy v. Lord*,—summary of the law.

(k) See *Re Way's Settlement*, 13 W. R. 149.

(l) L. R. 4 Eq. 562.

(m) 4 De G. F. & J. 264.

ing upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual, if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol.

(b.) Trust not actually executed,—either (1) by direction to trustees, or (2) by conveyance or assignment of equitable interest.

(b.) “But in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court *to perfect an imperfect gift*.” Where, therefore, the facts show an intention to transfer property, and not to declare a trust, the court will not give effect to an imperfect transfer by treating it as a declaration of trust (n).

III. *Fraudulent trusts*,—principally in relation to marriage.

Thirdly,—A conveyance upon trust may (or may not) be fraudulent, and ineffectual (or effectual) accordingly. Further, various species of frauds, arising either at common law or under the provisions of particular statutes, have to be considered, and principally in connection with marriage settlements, in order to determine whether the settlement (being otherwise good and perfect) is to stand or fall. We propose to indicate the principal provisions of the statutes.

(a.) 13 Eliz., c. 5,—frauds under.

(a.) By the *statute* 13 Eliz., c. 5, all covinous conveyances, gifts, alienations of lands or goods, whereby *creditors* might be in any wise disturbed, hindered, delayed, or defrauded of their just rights, are declared *utterly void*, but the act is not to extend to any estate or interest in lands, &c., *on good consideration and bonâ*

---

(n) *Milroy v. Lord*, 4 De G. F. & J. 264; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Richards v. Delbridge*, 22 W. R. 584.

*fide* conveyed to any person not having notice of such covin.

This statute does not declare all voluntary conveyances to be void, but only all fraudulent conveyances to be void (o), and whether a conveyance be fraudulent or not, is declared to depend upon its being made upon good consideration and *bonâ fide*. It is not sufficient that it be upon good consideration or *bonâ fide*. It must be both: and, therefore, if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void as to creditors (p).

Settlement must be both on good consideration and *bonâ fide*.

The word "voluntary" is not to be found in the statute 13 Eliz., c. 5. A voluntary conveyance may therefore be made of real or personal property, without any consideration whatever, and cannot be avoided, at least under that statute, by subsequent creditors unless it be of the description mentioned in the statute (q).

Voluntary conveyances not necessarily fraudulent under 13 Eliz., c. 5.

It was for some time thought that the mere fact of the settlor being indebted at the time of his voluntary conveyance, was sufficient to invalidate that conveyance under the statute in favour of creditors, and certain dicta of Lord Westbury, in *Spirett v. Willows* (r), were supposed to support that view. It was there said, "that if the debt of the creditor by whom the voluntary conveyance is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." His Lordship meant, of course, that, having shown so much,

Settlor being indebted does not *per se* invalidate conveyance.

Doctrine in *Spirett v. Willows* stated.

(o) *Holloway v. Millard*, 1 Mad. 414.

(p) St. 353; but see *Middleton v. Pollock*, *Ex parte Elliott*, L. R. 2 Ch. Div. 104.

(q) *Holloway v. Millard*, 1 Mad. 419.

(r) 3 De G. J. & S. 293; 34 L. J. Ch. 367.

you had shown enough, and it was not necessary to go on and show further that the settlor was also insolvent.

*Freeman v. Pope*,—extension of decision in *Spirett v. Willows*.

The principle laid down in *Spirett v. Willows* has been reconsidered and approved, and also extended, in the recent case of *Freeman v. Pope* (s). The bill there was filed for the administration of the estate of A., and to set aside a voluntary settlement executed by him some years previous to his death, *by a creditor whose claim had accrued since the date of the settlement*. It was proved that A. was perfectly solvent up to the date of the settlement, but that the effect of the settlement was to deprive him of the means of paying certain then existing debts. Lord Hatherley, in deciding against the validity of the settlement, after reviewing the authorities, stated the law to be that in the absence of direct proof of intention to defraud, if a person owing debts made a settlement which subtracted from the property which was the proper fund for payment of those debts, an amount without which the then existing debts could not be paid, then the law would presume an intention to defeat and delay creditors, such as to bring the case within the statute. In other words, the subsequent creditors, upon showing in effect that the money lent by them must have been applied towards paying the former creditors who were in existence at the date of the settlement, but had subsequently been paid off, were decided to have an equity to “stand in the shoes” of the previously existing creditor, for the purpose of impeaching the settlement.

What amount of indebtedness will raise presumption of fraudulent intent, within the meaning of 13 Eliz., c. 5.

The question as to what amount of indebtedness will raise the presumption of fraudulent intent, within the meaning of the statute 13 Eliz., c. 5, is one of evidence to be decided upon the facts of each case. Mere indebtedness will not suffice, nor, on the other

---

(s) L. R. 5 Ch. 538; and see *Taylor v. Caenen*, L. R. 1 Ch. Div. 636.

hand, is it necessary to prove absolute insolvency. To quote the words of Lord Hatherley, when Vice-Chancellor, in *Holmes v. Penney* (t):—"The settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were creditors of the settlor" (u). In other words, the settlor must either have been already insolvent, *i.e.*, embarrassed, at the date of the settlement, or must have become immediately embarrassed in consequence thereof.

(b.) The statute 27 Eliz., c. 4, was enacted for the protection of *purchasers*, as the statute 13 Eliz., c. 5, was for that of creditors. It enacts that every conveyance, grant, charge, lease, limitation of use, of, in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as shall purchase the said lands, or any rent or profit out of the same, shall be deemed, but only as against such persons, their heirs, &c., who shall so purchase for money or any good consideration the said lands, &c., to be *wholly void*, frustrate, and of none effect.

A voluntary settlement of lands made in consideration of natural love and affection is void, as against a subsequent purchaser of the same lands for valuable consideration, even though with notice (v), for the very execution of a subsequent conveyance sufficiently evinces the fraudulent intent of the former one. The voluntary settlement is, however, good as against the grantor, who therefore cannot compel specific perform-

Voluntary settlement void against subsequent purchaser.

(t) 3 K. & J. 90; *Townsend v. Westacott*, 2 Beav. 340.

(u) See St. 362-365, where the English and the American decisions on this point are fully reviewed and compared. See also May on Voluntary Conveyances, 41-47.

(v) *Doe v. Manning*, 9 East, 59.

ance of a subsequent contract for sale of lands so settled (*w*), though the purchaser from him can (*x*).

Chattels personal not within the statute.

Chattels personal, in which respect they differ from chattels real, are not within the statute 27 Eliz., c. 4, and, therefore, a voluntary settlement of chattels personal cannot be defeated by a subsequent sale (*y*). And even as regards chattels real, *i.e.*, leasehold properties, the recent decisions tend to this result, that if the volunteer undertakes the onerous covenants comprised in the loan, he is not in fact a volunteer (*z*).

Purchaser—who.

A mortgagee (*a*), and likewise a lessee, is a purchaser within the meaning of the statute; but a judgment creditor is not so (*b*).

Subsequent purchase must be from the very settlor himself.

It has been decided not only that a *bonâ fide* purchaser for value from the heir-at-law or devisee of one who has made a voluntary conveyance is not within the statute, but also that a person who purchases for value from one claiming under a second voluntary conveyance, or from any other than the person who made the voluntary conveyance in his lifetime, is equally excluded from the benefit of the statute (*c*).

*Bonâ fide* purchaser under 13 Eliz., c. 5, and 27 Eliz., c. 4.

In 27 Eliz., c. 4, s. 4, there is a proviso, similar to that in 13 Eliz., c. 5, s. 5, in favour of a *bonâ fide* purchaser, that that Act shall not extend to or be construed to defeat any conveyances, &c., of lands made upon or for good consideration, and *bonâ fide* to any person.

(*w*) *Smith v. Garland*, 2 Mer. 123.

(*x*) *Daking v. Whimper*, 26 Beav. 568.

(*y*) *Bill v. Cureton*, 2 My. & K. 503; *M'Donnell v. Hesilrige*, 16 Beav. 346.

(*z*) *Saunders v. Dehew*, 2 Vern. 272; *Price v. Jenkins*, L. R. 4 Ch. Div. 483; *Gale v. Gale*, L. R. 6 Ch. Div. 144. See also *Ex parte Doble*, in re *Doble*, 26 W. R. 407; *Ex parte Hillman*, in re *Pumfrey*, 10 Ch. Div. 622.

(*a*) *Chapman v. Emery*, Cowp. 279; *Cracknall v. Janson*, 11 Ch. Div. 1.

(*b*) *Beavan v. Earl of Oxford*, 6 De. G. M. & G. 507.

(*c*) *Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132; *Richards v. Lewis*, 11 C. B. 1035; *General Meat Supply Association v. Bouffler*, W. N. 1879, 26.

*Bonâ fide* purchasers are such as take *bonâ fide*, *Bonâ fide* purchasers, definition of.  
and for a valuable consideration. And this leads us to the inquiry, What is a valuable consideration under this statute? Lawful considerations generally may be divided into two classes:—

1. Meritorious or good considerations import a consideration of blood or natural affection, as when a man grants an estate to a near relation; or they are founded merely upon motives of generosity, prudence, and natural duty. Such considerations standing alone will not avail to support a conveyance as against a subsequent purchaser for value. Considerations are either (1.) Meritorious;

2. Valuable considerations are *money, marriage, or* Or (2.)  
the like, which the law esteems an equivalent for Valuable.  
money.

The consideration of marriage has always been recognised by courts of law and equity as a valuable one; and previous to the Statute of Frauds a mere promise by the intended husband to settle property upon the intended wife was upheld by the subsequent marriage. The Statute of Frauds, 29 Car. II., c. 3, s. 4, did not change the principle, but only required an additional circumstance by way of evidence,—that such ante-nuptial agreement should be in writing, in order that it should bind the husband, or other the party signing it. In the case, therefore, of an ante-nuptial agreement followed by marriage, the wife becomes a purchaser within the statute 27 Eliz., c. 4 (d). Marriage consideration under 27 Eliz., c. 4.

It appears also that a post-nuptial settlement, made in pursuance of an ante-nuptial parol agreement, is good as against a subsequent purchaser for value although Post-nuptial settlement in pursuance of ante-nuptial parol agreement.

without notice, under the 27 Eliz., c. 4 (e); although a mere post-nuptial settlement, without any ante-nuptial agreement, is void under that statute as against a subsequent purchaser for value, even with notice (f).

*Bonâ fide*  
post-nuptial  
settlement  
supported on  
slight con-  
sideration.

But though a post-nuptial voluntary settlement made by the husband or wife, and not in pursuance of ante-nuptial agreement, is within the provisions of the 27 Eliz., c. 4, and is void against a subsequent purchaser of that estate, still a court of equity is willing to support such a post-nuptial settlement on very slight consideration. Thus, in *Hewison v. Negus* (g), it was decided that if the wife's real estate, of which her husband would be entitled to receive the rents and profits during her coverture, be settled by post-nuptial settlement on her for life, for *her separate use*, &c., with remainder to the children, the post-nuptial settlement is not void under the 27 Eliz., c. 4, as against a subsequent purchaser from the husband and wife. "I concur," said the Master of the Rolls, "with the argument which was urged, that the surrender by the husband of his right to receive the rents and profits of the hereditaments during coverture, and his giving his wife a sole and exclusive power and control over them, is a valuable consideration sufficient to support this settlement." The husband was a purchaser on behalf of his children, giving up his own life estate, in consideration of the estates limited to his children. And, *semble*, a *bonâ fide* post-nuptial settlement of leasehold properties, subject to onerous covenants, is not a voluntary settlement (h).

(e) *Dundas v. Dutens*, 2 Cox, 235; *Spurgeon v. Collier*, 1 Eden, 55; *Warden v. Jones*, 2 De G. & Jo. 76; and see the principle in *Bailey v. Sweeting*, 9 C. B., N.S., 843; 30 L. J. C.P. 150. But see *Trowell v. Shenton*, 8 Ch. Div. 318.

(f) *Butterfield v. Heath*, 15 Beav. 408; *Warden v. Jones*, 2 De G. & Jo. 76.

(g) 16 Beav. 594; and see *Bayspoole v. Collins*, L. R. 6 Ch. app. 228; *Teasdale v. Braithwaite*, L. R. 4 Ch. Div. 85, and 5 Ch. Div. 630; *In re Foster v. Lister*, L. R. 6 Ch. Div. 87.

(h) *Ex parte Doble*, in *re Doble*, 26 W. R. 407, affirmed and explained in *Ex parte Hillman*, in *re Pumfrey*, 10 Ch. Div. 622.



And conversely, even an ante-nuptial voluntary settlement, for which the marriage is the sole consideration on the part of the wife, will not be supported as against a subsequent purchaser, if the marriage is in effect no consideration emanating from the wife. Thus, in *Colombine v. Penhall* (i), a gentleman went through a valid ceremony of marriage with a female who had previously given herself to him in concubinage for a period of years; and he settled considerable property upon her prior to and in purported consideration of the marriage. The court being, however, of opinion that the female in question had not given, as a consideration for the marriage, anything she had not already previously given for nothing or for some other consideration, and that she was aware of the real character of the transaction, set aside the settlement as fraudulent against a subsequent purchaser.

*Mala fide præ-nuptial settlement not supported.*

(c.) A very factitious and artificial species of fraud was introduced for the protection of creditors, but not of subsequent mortgagees, lessees, or purchasers, by the Bills of Sale Act, 1854, which was amended by the Bills of Sale Act, 1866 (j), both which Acts have been repealed by the Bills of Sale Act, 1878 (k), but their provisions in effect re-enacted with some important variations. Under the Bills of Sale Act, 1878 (k), it has been enacted in effect as follows:—That every bill of sale of personal chattels made on or after the 1st January 1879, whereby, whether the same be absolute or conditional, or subject or not subject to any trust, the grantee or holder thereof shall have power, either with notice or without notice, and either as from or at any future time after the execution of the bill of sale, to seize or take possession of any personal chattels

(c.) The Bills of Sale Act, 1854, 17 & 18 Vict., c. 36,—frauds under.

(i) 1 Sm. & Giff. 228; see also *Bulmer v. Hunter*, L. R., 8 Eq. 46.

(j) 17 & 18 Vict., c. 36; 29 & 30 Vict., c. 96.

(k) 41 & 42 Vict., c. 31.

comprised in or subject to such bill shall be, as against the trustee in bankruptcy, general assignees, and execution creditors of the grantor, void to all intents and purposes, to the extent of such part of the property therein comprised as consists of personal chattels being in the possession or apparent possession of the grantor, at or after the date of the bankruptcy, general assignment, or execution (as the case may be), and after seven days from such date, unless the following requisites of the Act have been complied with, viz.—

1. The bill of sale (including the schedule thereto, if any), or a true copy thereof, is to be filed with the docquets or judgments clerk in the Queen's Bench Division within seven days from the execution of the bill of sale.

2. An affidavit stating—

- (a.) The time of making the bill of sale, and the due execution thereof;
- (b.) The residence and occupation of the maker thereof; and
- (c.) The residences and occupations of the witnesses attesting the bill, one of whom must be a solicitor,

is at the same time with filing the bill of sale (1), and within seven days from the execution thereof, to be filed in like manner as the bill of sale itself.

And every such bill of sale as aforesaid is to be re-registered every five years.

By the interpretation clause of the Act, a bill of

---

(1) *Grindell v. Brendon*, 6 C. B., N.S. 698.

sale is extended to include assignments and all other assurances of personal chattels, and also licences or other authorities (including attornments and agreements under which any right arises) to take possession of personal chattels as security for a debt; and personal chattels are extended to include goods, furniture, and also such fixtures in general as are removable by a tenant at or before the expiration of his lease.

The Act of 1878, like the Bills of Sale Acts, 1854 & 1866, expressly exempts marriage settlements from their operation; but this exemption extends only to ante-nuptial and not also to post-nuptial settlements (*m*). But the 20th section of the Act expressly provides, that the chattels comprised in a bill of sale which has been and continues to be duly registered under the Act, shall not be deemed to be in the possession, order, or disposition of the grantor of the bill within the meaning of the Bankruptcy Act, 1869.

(*d*.) By the Bankruptcy Act, 1869 (*n*), s. 91, the following provisions have been made, but with reference only to post-nuptial settlements, and in the case of these even, only when made by traders; that is to say—

(*d*.) The Bankruptcy Act, 1869, s. 91,—frauds under.

I. With reference to the husband's property in his own right,—(1.) Any post-nuptial settlement made within two years of the subsequent bankruptcy of the settlor is, *ipso facto*, void upon the bankruptcy (*scil.*, as against the trustee in the bankruptcy).

(2.) Any post-nuptial settlement made within ten years of the subsequent bankruptcy of the settlor, and outside the first two of such ten years, is also void upon the bankruptcy (*scil.*, as against the trustee in the bankruptcy), unless and until the settlor proves that

---

(*m*) *Ashton v. Blackshaw*, L. R. 9 Eq. 510. See also *Brown's Law Dictionary*—title, *Fraudulent Gifts*.

(*n*) 32 & 33 Vict., c. 71.

the same was not in fact fraudulent as against his creditors.

II. With reference to the husband's property in right of his wife,—Any post-nuptial settlement on the wife and children of the settlor is good (no matter how soon the bankruptcy of the settlor may come about), provided it be of property that has accrued to him through his wife during the coverture.

Also by the same Act and the same section thereof, it is provided that all ante-nuptial covenants and contracts by a trader to settle property yet to be acquired, shall be void upon the trader's subsequent bankruptcy, unless prior to such bankruptcy the property referred to has been both acquired, and also in fact settled pursuant to the covenant or contract (*o*).

Who are within the scope of the marriage consideration.

There have been some cases in which the question has been, how far the consideration of marriage will extend, and whether limitations in favour of very remote objects may not be void as against subsequent purchasers. A limitation to the issue of the settlor by a second marriage was held *not* to be voluntary (*p*). So a settlement on her marriage, made by a woman of her property, as a provision for her illegitimate child, was upheld as against a subsequent mortgagee (*q*). But a limitation to the brothers of a settlor was held voluntary (*r*).

But limitations in favour of collaterals will be sup-

(*o*) *Ex parte* Bishop, in *re* Tönnies, L. R. 8 Ch. App. 718. See Brown's Law Dictionary—title, *Fraudulent Gifts*.

(*p*) *Clayton v. E. of Winton*, 3 Mad. 302 n.; *Newstead v. Searles*, 1 Atk. 265.

(*q*) *Clark v. Wright*, 6 H. & N. 849; see *Price v. Jenkins*, L. R. 4 Ch. Div. 483; *Gale v. Gale*, L. R. 6 Ch. Div. 144.

(*r*) *Johnson v. Legard*, 6 M. & S. 60; *Stackpoole v. Stackpoole*, 4 Dru. & Warr. 320.

ported if there be any party to the settlement who purchases on their behalf (s).

Fourthly,—Conveyances upon trust may be upon trust for creditors. And to the general rule that a declaration of trust in favour of volunteers by the legal or equitable owner of realty or of personalty is irrevocable, there is an important exception in the class of cases where a debtor, without the knowledge of his creditors, makes a transfer of property to trustees for payment of his debts. Such a transaction does not invest creditors with the character of *cestui que trusts*, but amounts merely to a direction to the trustees as to the mode in which they are to apply the property vested in them, for the benefit of the owner of the property, the debtor, who alone stands to them in the relation of *cestui que trust*, and can vary or revoke the trusts at pleasure (t). In *Walwyn v. Coutts* (u), a father conveyed his estates to trustees for paying off annuities granted by his son, together with the arrears, and also his son's debts, if they thought proper. The annuitants were mentioned in a schedule, but were neither parties nor privies to the deed. The father and son then executed other deeds varying the former trusts. A motion by one of the scheduled creditors to restrain the trustees from executing the trusts of the subsequent deeds until they performed the trusts of the first was refused.

IV. *Trusts in favour of creditors*,—revocable, as a general rule.

Amounts to a mere direction to trustees as to mode of disposition.

So again in *Garrard v. Lauderdale* (v), it was held that an assignment of personal property to trustees, for payment of certain scheduled creditors who did not execute the deed or conform to its terms, although the execution of the deed had been communicated to them,

(s) *Heap v. Tonge*, 9 Hare, 104; *Pulvertoft v. Pulvertoft*, 18 Ves. 92. See also Brown's Law Dictionary—title, *Marriage Settlement*.

(t) May on Voluntary Conveyances, p. 397.

(u) 3 Sim. 14.

(v) 3 Sim. 1.

And is an arrangement for the debtor's own benefit and convenience.

could not be enforced by the non-executing and non-conforming creditors. So far from conforming to its terms, the plaintiff had come in under a decree made in a suit for the administration of the debtor's estate, and had proved his debt before the master in such suit *after* the receipt of the letter informing him of the conveyance to the trustees. In the judgment it was said—"I take the real nature of the deed to be, not so much a conveyance vesting a trust in A. for the benefit of the creditors of the grantor, but rather an arrangement made by the debtor for his own personal convenience and accommodation—for the payment of his own debts in an order prescribed by himself, over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it—they *wave no right of action*, and are *not executing parties* to it."

In *Acton v. Woodgate* (*w*), the debtor made two conveyances; the *first* was not communicated to any creditor except the trustees, who were also creditors; the *second* conveyance was made to the same trustees for the payment of their own debts, and of all other debts due by the debtor, and was executed by several creditors who were not privy to the first. The trusts of the *second* conveyance were decreed to be carried into execution. In the judgment the following remarks were made: "It is established by the authorities which have been referred to, that if a debtor conveys property in trust for the benefit of his creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his

creditors, and before any payment made by the agent, or communication made by him to the creditors, had recalled the money so delivered."

The learned judge then proceeds to say,—“In the case of *Garrard v. Lauderdale*, it seems to have been considered that a communication by the trustees to creditors, of the fact of such a trust, would not defeat the power of revocation by the debtor. It appears to me, however, that this doctrine is questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised.”

Effect of communication to creditors followed by forbearance in faith of the deed.

There has been a considerable conflict of dicta, or apparent conflict, as to whether the mere fact of communication of a trust in favour of creditors to such creditors, will deprive the donor of that power of revocation, which it has been shown he possesses. It is submitted that the true principle is correctly laid down by Sir John Leach, M.R., in *Acton v. Woodgate* (x), and that the trust, after communication, is irrevocable, if the creditors have been “thereby induced to a forbearance in respect of their claims which they would not have otherwise exercised,” or in the words of Sir J. Romilly, M. R., in *Biron v. Mount* (y), “The principle is well laid down by Lord St. Leonards in *Field v. Donoughmore* (z), where he states, ‘It is not absolutely essential that the creditor should execute the deed; if he has assented to it, and if he has acquiesced in it, or acted under its provisions and complied with its terms, and the other side express no dissatisfaction, the settled law of the court is that he is entitled to its benefits.’ About that I entertain no doubt, but I apprehend for this purpose he must do some acts which amount to

Forbearance should be evidenced by some positive act.

(x) 2 My. & K. 495.

(z) 1 Dru. & War. 227.

(y) 24 Beav. 649.

acquiescence. It is not sufficient merely to stand by and take no part at all in the matter. It is true that in some cases, as is said in the case of *Nicholson v. Tutin* (a), something may be inferred from his standing by, until he has lost a remedy which he might have had at law, if he had not come in under the deed. But no such question arises here. In my opinion, he must do some act" (b).

Effect of the creditor being a party to the deed.

Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debts due to that creditor, the deed is as to that creditor irrevocable (c).

A creditor who for a long time delays (d), or sets up a title adverse to the deed (e), will not be allowed to claim the benefit of its provisions; as neither will any creditor to whom the existence of the deed has never been communicated, *semble* (f).

V. *Equitable Assignments.*

Closely allied with the subject of assignments to trustees in favour of creditors, is that of equitable assignments, so called, directly to creditors.

General rule of the old common law.

"The great wisdom and policy of the sages and founders of our law," says Lord Coke, "have provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers; for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the

(a) 2 K. & J. 23.

(b) *Kirwan v. Daniel*, 5 Hare, 499; *Griffith v. Ricketts*, 7 Hare, 307; *Corinthwaite v. Frith*, 4 De G. & Sm. 552; *Siggers v. Evans*, 5 Ell. & B. 367.

(c) *Mackinnon v. Stewart*, 1 Sim. N.S. 88; *La Touche v. Earl of Lucan*, 7 C. & F. 772; *Montefiore v. Brown*, 7 H. L. Cas. 241-266.

(d) *Gould v. Robertson*, 4 De G. & Sm. 509.

(e) *Watson v. Knight*, 19 Beav. 369.

(f) *Johns v. James*, 8 Ch. Div. 744.



subversion of the due and equal execution of justice."

The reasons given by Lord Coke for this rule of law which prevents the assignment of a possibility or chose in action, have been almost wholly disregarded by courts of equity; and, accordingly, from a very early period, assignments of a mere naked possibility, or of a chose in action, for valuable consideration, have been held valid in equity, which will carry them into effect upon the same principle that it enforces the performance of an agreement, when not contrary to its own rules or public policy (*g*). A mere expectancy, therefore, as that of an heir-at-law to the estate of an ancestor (*h*), or the interest which a person may take under the will of another then living (*i*), non-existing property to be acquired at a future time, as the future cargo of a ship (*j*), is assignable in equity for valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced (*k*).

Respects in which equity infringed upon the rule of the old common law.

Even the common law has in modern times broken in upon the old rule, prohibiting the assignment of choses in action, as in the case of negotiable instruments, and some few other securities, or where a debtor assents to the transfer of the debt, so as to enable the assignee to maintain a direct action against him, on the implied promise which results from such assent (*l*). And in the case of assignments of bonds or other debts which are an exception to the above-mentioned rule, it is necessary to sue in the name of the original creditor; the person to whom it is trans-

Respects in which the common law even has infringed upon its own rule.

(*g*) *Squib v. Wyn*, 1 P. Wms. 378.

(*h*) *Hobson v. Trevor*, 2 P. W. 191.

(*i*) *Bennett v. Cooper*, 9 B. & A. 252.

(*j*) *Lindsay v. Gibbs*, 22 Beav. 522.

(*k*) *Holroyd v. Marshall*, 10 H. L. Cas. 191.

(*l*) *Baron v. Husband*, 4 B. & Ad. 611.

ferred being regarded rather as an attorney than as an assignee (*m*).

Contingent  
interests and  
possibilities.

By 8 & 9 Vict., c. 106, s. 6, contingent and future interests and possibilities, coupled with an interest in real estate, may now be granted or assigned in law; this Act, it will be observed, does not render assignments of contingent interests or possibilities in *chattels*, or mere naked possibilities *not* coupled with an interest, valid at law; the exclusive jurisdiction, therefore, of courts of equity, as to such assignments, is untouched by the Act.

Policies of life  
and marine  
insurance.

By 30 & 31 Vict., c. 144, policies of life assurance may be legally assigned in the form provided by the Act, either by endorsement on the policy, or by separate instrument; and by 31 & 32 Vict., c. 86, policies of marine insurance may similarly be assigned by endorsement in statutory form. Lastly, by the Judicature

Debts and  
other legal  
choses in  
action under  
Supreme Court  
of Judicature  
Act.

Act, 1873 (*n*), s. 25, sub-sect. 6, debts and other legal choses in action, without any distinction, may now be assigned at law, where the assignment is absolute, and not by way of charge only; but the assignment is subject to all equities affecting the assignor.

These enactments are in effect statutory recognitions of a doctrine long since acted upon in the Court of Chancery. For in equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, has always been considered a binding equitable assignment or (speaking accurately) appropriation of so much money.

Order given by  
debtor to his  
creditor upon  
a third person,  
a good equitable  
assignment, *i.e.*, ap-  
propriation.

Thus, in *Burn v. Carvalho* (*o*), A. having goods in

---

(*m*) *De Pothonier v. De Mattos*, Ell. Bl. & Ell. 467.

(*n*) 36 & 37 Vict., c. 66.

(*o*) 4 My. & Cr. 690.

the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and, by a subsequent letter to B., did direct B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A. under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy. *Held*, that C. had a good title in equity to the goods.

Again, in *Diplock v. Hammond* (*p*), A. having obtained a loan from B., gave him the following instrument addressed to his (A.'s) debtor:—"I hereby authorise you to pay £365, being the amount of my contract, B. having advanced me that sum." *Held* a valid equitable assignment (*q*).

A mere mandate from a principal to his agent, not communicated to a third person, will give him no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit (*r*). Such a mandate is clearly no appropriation or equitable assignment of property in favour of a creditor. Thus, in *Rodick v. Gandell* (*s*), a railway company was indebted to the defendant, their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors* of the company, authorised them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised

Mandate from principal to agent,—confers no right on the creditor.

(*p*) 2 Sm. & G. 141; 5 De G. M. & G. 320.

(*q*) *Farquhar v. City of Toronto*, 12 Gr. 186.

(*r*) *Morrell v. Wootten*, 16 Beav. 197.

(*s*) 1 De G. M. & G. 763. And see *Ex parte Hall, in re Whitting*, 10 Ch. Div. 615.

the bankers to pay them such money, *on raising it. Held*, that this did not amount to an equitable assignment of the debt. "The extent of the principle," said Lord Truro, "to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. I think that a decision, that the authority to the solicitors contained in the letter, to receive the debt due from the railway company, and to pay what should be received to the bank, operated as an assignment in equity of the railway debt, would be to extend the principle much beyond the warrant of the authorities. If an assignment of the debts had been intended, it would have been quite as easy to have directed the order to the railway company as to the solicitors. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been ascertained, and some definite portion been adjusted and realised."

Notice to legal holder by assignee of chose in action necessary to perfect title,—as against third person.

In order that third parties may be bound, it is necessary, with regard to a chose in action, for the assignee, to do all that can be done to perfect the assignment, to do everything towards having possession, which the subject admits; to do "that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as his property. For this purpose he must give notice to the legal holder of the fund: in the case of a debt, for instance, notice to the debtor is for many purposes tantamount

to possession. If he omit to give that notice, he is guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title, in the actual possession, and under the absolute control, of another person." Notice, then, is necessary to perfect the title, to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If the assignee is willing to trust the personal credit of the man, and is satisfied that he will make no improper use of the possession in which he is allowed to remain, notice is not necessary, for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before the assignee's pocket-conveyance is notified to them, the assignee must be postponed. On being postponed, the assignee's security is not invalidated; he had priority, but that priority has not been followed up; he has permitted another to acquire a better title to the legal possession (*t*). Where an assignee has done all in his power towards taking possession, he will not lose his priority (*u*).

Such notice  
is tantamount  
to possession.

And gives a  
right *in rem*.

The assignee of a chose in action, although without notice, in general takes it subject to all the equities which subsist against the assignor. Thus, in *Turton v. Benson* (*v*), where a son on his marriage was to have from his mother, as a portion with his wife, exactly as much as his intended father-in-law should allow to his daughter, and privately, without notice to his mother, who treated for the marriage, gave a bond to the wife's father to pay back £1000 of the wife's portion seven

Assignee of  
chose in  
action takes  
subject to  
equities.

(*t*) *Ryall v. Rowles*, 2 L. C. 729; *Dearle v. Hall*, 3 Russ. 1; *In re Freshfield's Trust*, 11 Ch. Div. 198; *Buller v. Plunkett*, 1 J. & H. 441.

(*u*) *Feltham v. Clark*, 1 De G. & Sm. 307; *Langton v. Horton*, 1 Hare, 549.

(*v*) 1 P. Wms. 496; and see Judicature Act, 1873, 36 & 37 Vict., c. 66, sec. 25, sub-sec. 6.

years after, in consideration that the father-in-law should make the wife's portion £3000, instead of (as he had intended) £2000 only; and the bond was afterwards assigned for the benefit of the creditors of the father-in-law; it was held that the bond being void in equity in the hands of the father-in-law could not be made better by the assignment (*w*), in the hands of the creditors, although taken without notice of the son's fraud.

Exception as  
to negotiable  
instruments.

And as to  
debentures  
payable to  
bearer.

But though this rule generally holds good, it has been observed that length of time and other circumstances may make the case of the assignee stronger (*x*); and further, the equities affecting the assignor must be in respect of the very chose in action itself; and, moreover, an exception to the rule occurs in the case of negotiable instruments, "because if the rule were otherwise," Lord Keeper Somers observed, "it would tend to destroy trade, which is carried on everywhere by bills of exchange, and he would not lessen an honest creditor's security" (*y*). And the rule will yield in equity where a contrary intention appears from the nature and terms of the contract between the original contracting parties. Thus, debentures made payable to bearer were held to bind the company issuing them, in the hands of transferees for value, irrespective of any equities between the company and the original holders (*z*).

Assignment of

And it is expressly provided by the Supreme Court

(*w*) *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Athenæum Life Assurance Society v. Pooley*, 3 De G. & Jo. 294; *Graham v. Johnson*, L. R. 8 Eq. 36.

(*x*) *Hill v. Caillovel*, 1 Ves. Sr. 123; *Ex parte Chorley*, L. R. 11 Eq. 157.

(*y*) *Anon.* Com. Rep. 43; and see *Beckervaise v. Lewis*, L. R. 7 C. P. 372.

(*z*) *In re Blakeley Ordinance Company*, L. R. 3 Ch. App. 154. *In re General Estates Company*, ib. 758. But see *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

of Judicature Act, 1873, "that an absolute assignment *in writing under the hand* of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice *in writing* shall have been given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor (a).

debts and legal  
chose in  
action under  
37 & 38 Vict.,  
c. 66, s. 25, § 6.

As in the case of agreements, a court of equity will not, upon the ground of public policy, give effect to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of their official duties. Thus the pay of an officer in the army (b), and the salary of a judge given to him to support the dignity of his office, have been held not assignable; but, *semble*, such assignments are valid when the office is a sinecure or the duties have ceased (c).

Assignments  
contrary to  
public policy.

Courts of equity, on principles of public policy, will not give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles (d). Thus, in *Stevens v. Bagwell* (e), one-

Assignments  
affected by  
champerty  
and mainten-  
ance.

(a) *Brice v. Bannister*, 3 Q. B. D. 569.

(b) *Stone v. Lidderdale*, 2 Anst. 533.

(c) *Arbuthnot v. Norton*, 5 Moore's P. C. C. 219; *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 550; *Willcock v. Terrell*, 3 Exch. Div. 323.

(d) *Reynell v. Sprye*, 1 De G. M. & G. 660.

(e) 15 Ves. 139.

fifth part of the share of prize money, the subject of a suit *then depending* in the Admiralty Court, was assigned by the executrix of one of the captors, and her husband, to a navy agent, in consideration of his indemnifying them from all costs on account of any suit touching the said prize money, and paying to them the remaining four-fifths, if it should be recovered. *Held*, that the assignment was void as amounting to that species of maintenance which is called champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it (*f*).

Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, equity will not enforce the assignment of a mere naked right to litigate, *i.e.*, which, from its very nature, is incapable of conferring any benefit except through the medium of a suit, such as a mere naked right to set aside a conveyance for fraud (*g*).

Purchase  
*pendente lite*,  
where per-  
mitted.

But the purchase of an interest *pendente lite* (*h*), or a mortgage *pendente lite* (*i*), or the advance of money for carrying on a suit, if the parties have a common interest (*j*), or if there exists between the parties the relation of father and son (*k*), or master and servant (*l*), will not be considered as maintenance or champerty (*m*). Moreover, a purchase from the defendant is always valid, he having the possession, and therefore something more than a *mere* right of action.

---

(*f*) *Earle v. Hopwood*, 9 C. B. (N.S.) 566.

(*g*) *Prosser v. Edmonds*, 1 Y. & C. Exch. Ca. 481; *Powell v. Knowler*, 2 Atk. 226; *In re Paris Skating Rink Co.*, L. R. 5 Ch. Div. 959.

(*h*) *Knight v. Bowyer*, 2 De G. & Jo. 421, 455.

(*i*) *Cockell v. Taylor*, 15 Beav. 103, 117.

(*j*) *Hunter v. Daniel*, 4 Hare, 420.

(*k*) *Burke v. Greene*, 2 Ball & B. 521.

(*l*) *Wallis v. D. of Portland*, 3 Ves. 503.

(*m*) *Dickinson v. Burrell*, 14 W. R. 412.



A purchase by an attorney *pendente lite*, of the subject matter of the suit is invalid (n); and an undischarged bankrupt's assignment of his expectation of a surplus, in the administration of his estate, does not confer on the assignee any right to interfere in that administration (o).

Sixthly,—It remains to consider the constituents of a valid trust, or the elements required for its creation. VI. *Trusts*,—  
*how created.*  
Now, no particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. There are many cases, arising chiefly under wills, in which it is very difficult to determine whether or not a trust was intended to be created. “As a general rule,” observes Lord Langdale, “it has been laid down that when property is given absolutely to any person, and the same person is by the giver who has power to command, recommended, or entreated, or wished to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust:—

“*First*, If the words are so used that on the whole they ought to be construed as imperative or certain; The three  
certainties.

“*Secondly*, If the subject matter of the recommendation or wish be certain.

“*Thirdly*, If the objects or persons intended to have the benefit of the recommendation or wish be also certain.

“For example,—If a testator gives £1000 to A.,

(n) *Simpson v. Lamb*, 7 Ell. & Bl. 84; *Anderson v. Radcliffe*, 6 Jur. N.S. 578.

(o) *Ex parte Sheffield, in re Austin*, 10 Ch. Div. 434.

desiring, wishing, recommending, or hoping that A. will, at his death, give the same sum, or any part of it, to B., it is considered that B. is an object of the testator's bounty, and A. a trustee for him. No question arises on the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish.

"So, again, if a testator gives the residue of his estate, after certain purposes are answered, to A., recommending A., after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and the relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable, so capable of being made certain, that the rule is applicable to such cases, and that a valid trust is created.

No trust if there is a want of any one or more of the "three certainties."

"On the other hand, if the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any indefinite part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus, the words 'free and unfettered,' accompanying the strongest expression of request, were held to prevent the words of request being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any indefinite part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a de-

scription by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interests the objects are to take, will prevent the object from being certain within the meaning of the rule, and in such cases we are told that the question 'never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent, must be considered (*p*).'

*Firstly*, The words of recommendation used must be such that, upon the whole, they ought to be construed as imperative. No technical words are necessary, but the testator's intent is to be carried out, and his words "willing or desiring" that the person on whom he has conferred property should make a disposition of it in favour of certain objects, if reasonably certain, will be construed as imperative, and amount to a trust; as also the words and phrases "wish and request (*q*)," "have fullest confidence (*r*)," "heartily beseech (*s*)," "well know (*t*)," "of course he will give (*u*)."

*Secondly*, The subject matter of the recommendation or wish must be certain. Thus in *Buggins v. Yates* (*v*), where a testator, who, having devised real property to his wife to be sold for payment of his debts and legacies in aid of his personal estate, declared that he *did not doubt* but his wife would be kind to his children, it was

(*p*) *Knight v. Knight*, 3 Beav. 172; 11 C. & F. 513; *Meggison v. Moore*, 2 Ves. Jr. 632; *Bernard v. Minshull*, Johnson, 276; *In re Bond*, *Cole v. Hawes*, L. R., 4 Ch. Div. 238.

(*q*) *Godfrey v. Godfrey*, 11 W. R. 554; *Liddard v. Liddard*, 28 Beav. 266.

(*r*) *Shovelton v. Shovelton*, 32 Beav. 143. But see *Lambe v. Eames*, L. R. 6 Ch. App. 597; *Hutchinson v. Tennant*, 8 Ch. Div. 540; *Dawkins v. Lord Penrhyn*, 4 App. Ca. 51.

(*s*) *Meredith v. Heneage*, 1 Sim. 553.

(*t*) *Bardswell v. Bardswell*, 9 Sim. 319.

(*u*) *Robinson v. Smith*, Mad. & Geld. 194.

(*v*) 9 Mod. 122.

insisted on that this constituted a trust of the personal estate; but the court was of opinion that these words gave a right to no child in particular, or a right to any particular part of the estate, but that the clause was void for uncertainty.

Again, in *Curtis v. Rippon* (*w*), the testator, after appointing his wife guardian of his children, give all his property to her, "trusting that she would, in fear of God, and in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." *Held*, that the wife was absolutely entitled to the property; and there being no ascertained part of it provided for the children, and the wife being at liberty at her pleasure to diminish the capital either for the Church or the poor, that the plain intention of the testator was to leave the children dependent on the wife.

Where there is an absolute gift of property to a person, and a recommendation to give to a certain object "what shall be left" at his death, "or what he shall die possessed of," the subject will be considered uncertain (*x*).

The object  
must be  
certain.

*Thirdly*, The objects or persons intended to have the benefit of the recommendation or wish must be certain. Thus, in *Sale v. Moore* (*y*), where a testator bequeathed the residue of his property to his wife, not doubting that she would consider his near relations as he would have done if he had survived her. The V. C. held that the objects were uncertain. "Who were the objects of the trust? Did the testator," he asked, "mean re-

(*w*) 5 Mad. 434.

(*x*) *Pope v. Pope*, 10 Sim. 1; *Green v. Marsden*, 1 Drew. 646; *Constable v. Bull*, 3 De G. & Sm. 411.

(*y*) 1 Sim. 534.

lations at his own death, or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death?"

The tendency of the later decisions is against construing precatory or recommendatory words as trusts. If, therefore, the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context, that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, or where the motive by which the giver was actuated is stated, no trust will be created<sup>(z)</sup>. So where there was a gift of stock to a person, and there was added parenthetically (to enable him to assist such children of my deceased brother as he may find deserving of encouragement), it was held an absolute bequest, and that no trust was created for the children<sup>(a)</sup>.

Leaning against construing precatory words as trusts.

It is most important to observe that although vagueness in the object will unquestionably furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual; and it is not necessary to exclude the legatee from taking a beneficial interest, that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Thus, in *Briggs v. Penny* (b), the testatrix, after giving, among other legacies, a sum of £3000 to Sarah Penny, and a like sum of £3000 in addition for

If trust be intended, but not validly created, it enures for the benefit not of the trustee, but of the heir-at-law or next of kin.

*Briggs v. Penny.*

(z) *Howorth v. Dewell*, 29 Beav. 18; *Lambe v. Eames*, L. R. 10 Eq. 267.

(a) *Benson v. Whittam*, 5 Sim. 22.

(b) 3 Mac. & G. 546.

the trouble she would have as executrix, bequeathed all her residuary personal estate to the said Sarah Penny, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed Sarah Penny sole executrix of her will. It was held by Lord Truro, affirming the decision below, that Sarah Penny did not take the residue for her own benefit. "There is nothing," said his Lordship, "on the face of the words which necessarily implies what is vague and indefinite, as in those cases where the court has held that the uncertainty of the object has afforded evidence that no trust was intended. I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires.' And the very expression of confidence that Miss Penny would make a good use, and dispose of the property in a manner in accordance with the testatrix's designs, or desires, or intentions, appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or in other words to the same import, upon trust. It seems to me to be tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, but still in such a case it is clear a trust was intended, and that is sufficient to exclude the legatee from the beneficial interest. *Once establish that a trust was intended, and the legatee cannot take beneficially.* If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still *in all these cases the legatee is excluded and the next of kin take.* But there is peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not equally apt or clear. In this case, however, we are not left to spell out a trust from the

residuary clause alone; the fact that besides a legacy of £3000, another legacy is expressly given to Miss Penny, 'in addition for the trouble she will have in acting as my executrix,' clearly shows that she was not intended to take the residue beneficially; because if Miss Penny was to take the whole residue beneficially, as the testatrix must be presumed to have acted upon the belief, which the fact warranted, that her estate was abundantly sufficient to satisfy all bequests, there could be no object in taking out of that residue, of which she was to have the whole, £3000 for her trouble; the fact of the legacy not only strongly confirms, but is only consistent with, the hypothesis, that the whole residue was not to be taken beneficially. It cannot be referable to the trouble she would have in the execution of the bequests in the will itself or the proved codicils, for though the bequests are numerous, not one of them involves any amount of trouble; whereas the views and wishes of the testatrix to which she alluded, might be such that the carrying of them into effect might involve the executrix in very difficult trusts" (c).

Where property (real or personal) is given by will to a trustee, or being personal is bequeathed to or vests in the executor, and there is nothing on the face of the will suggesting that the beneficial interest is to be taken by such devisee-trustee or legatee-executor, or simple executor, and, *a fortiori*, if the contrary intention appears on the face of the will, then the beneficial interest is undisposed of by the will, and a further writing to be executed as a will is necessary to dispose of the beneficial interest. Therefore, no *secret trust*, declared by word of mouth only, or even declared by writing (unless such writing is duly executed and attested as a will, or, being in existence at the date of, is

VII. *Secret Trusts*,—when and when not enforced.

---

(c) *Langley v. Thomas*, 6 De G. M. & G., 645; *Bernard v. Minshull*, Johns. 276; and disting. *Stead v. Mellor*, L. R. 5 Ch. Div. 225.

incorporated in, the will), is permitted to be valid (*d*); but the property attempted to be subjected to the secret trust will go, so far as it consists of real estate, to the heir-at-law or residuary devisee, and, so far as it consists of personal estate, to the next of kin or residuary legatee. On the other hand, if the devisee or legatee (whether such legatee be also the executor or not) appears on the face of the will to be intended to take the beneficial interest as well as the legal interest, then no parol evidence to contradict or vary the plain effect of the will is admissible; but to this rule there is the usual exception on the ground of fraud, viz., that parol evidence may be admitted to prove a fraud on the part of the beneficial devisee or beneficial legatee in procuring the gift to be made to him by the will, in that he undertook a certain *secret trust*, and such undertaking on his part was the cause of the will being made as it is made; and in that case the court will enforce discovery of the secret trust, and if it find the secret trust lawful, it will decree execution thereof; and if it find the secret trust unlawful, it will give the property, if real, to the heir-at-law or residuary devisee, and if personal, to the next of kin or residuary legatee of the testator (*e*). But if no trust is imposed by the will, and no communication was made in the testator's lifetime to the devisee or legatee, the devise or bequest will be good, although the devisee or legatee may, notwithstanding the absence of legal obligation, be disposed from the bent and impulse of his own mind to carry out what he believes to have been the testator's wishes (*f*). And when lands were conveyed to trustees for a charity by a deed duly enrolled, and without any reservation upon the face of it to the grantor, but upon a *secret trust* that the deed

---

(*d*) *Adlington v. Cann*, 3 Atk. 141; *Muckleston v. Brown*, 6 Ves. 52.

(*e*) *Strickland v. Aldridge*, 9 Ves. 519.

(*f*) Lewin on Trusts, 5th edition, 52; *Cullen v. Attorney-General*, L. R. 1 H. L. 190; *Rowbotham v. Dunnnett*, 8 Ch. Div. 430.



should not operate until after the settlor's death, the deed was declared void, and decreed to be set aside (*g*).

There remains to be eighthly considered a class of cases, in which powers are given to persons accompanied with such words of recommendation in favour of certain objects as to render them powers in the nature of trusts; so that the failure of the donees to exercise such powers in favour of the objects will not turn to their prejudice, since the court will, to a certain extent, take upon itself the duties of the donees of the power (*h*). It is perfectly clear that where there is a mere power of disposing, and that power is not executed, this court cannot execute it (*i*). It is equally clear that wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this court will execute the trust (*j*). But there is not only a mere trust and a mere power, but there is also known to the court a power with which the party to whom it is given is entrusted, and which he is required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the court will to a certain extent discharge the duty in his room and place (*k*).

VIII. Powers in the nature of trusts; otherwise, trusts in the garb (or under the disguise) of powers.

Court takes upon itself their execution.

In *Burrough v. Philcox* (*l*), a testator directed that certain stock should stand in his name, and certain real estates remain unalienated, "until the following contingencies are completed;" and after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that in case

*Burrough v. Philcox*,—power equal to a trust subject to right of selection.

(*g*) *Way v. East*, 2 Drew. 44.

(*h*) *Gude v. Worthington*, 3 De G. & Sm. 389; *Izod v. Izod*, 32 Beav. 242.

(*i*) *Brown v. Higgs*, 8 Ves. 570.

(*j*) *Ibid.*

(*k*) *Ibid.*, 8 Ves. 561; *Tweeddale v. Tweeddale*, 7 Ch. Div. 633; *Wheeler v. Warner*, 1 S. & S. 304.

(*l*) 5 My. & Cr. 72.

his two children should both die without leaving lawful issue, the same should be disposed of, as after mentioned; that is to say, the survivor of his two children should have power to dispose by his will, of his real and personal estate, "amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper." It was held by Lord Cottenham that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of *selection* and distribution in his surviving child. "When there appears," observes his Lordship, "a general intention in favour of a class and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the court will carry into effect the general intention in favour of the class."

General intention in favour of a class carried out, if particular intention fail.

*Salisbury v. Denton*,—to same effect.

In *Salisbury v. Denton* (*m*), a testator by will gave a fund to be at the disposal of his widow by her will, therewith to apply a part for charity, the remainder to be at her disposal among my "relations, in such proportions as she may be pleased to direct." The widow died without exercising the power of determining the proportions in which each was to take. *Held*, that the bequest was not void for uncertainty, but that the court would divide the fund in moieties, and give one of such moieties to charitable purposes, and the other moiety to such of the testator's relatives as were capable of taking within the statutes of distribution (*n*).

The shares of the appointees are equal.

The case lastly before referred to shows, that when equity executes an unexecuted power-trust or trust-power of this sort, she applies her own maxim, that equality is equity, and divides the property equally;

(*m*) 3 K. & J. 529.

(*n*) *Little v. Neil*, 10 W. R. 592; *Gough v. Bult*, 16 Sim. 45.

although the trustee, if he had chosen to exercise the power, might have used a discretion (o).

A *cestui que trust* is the peculiar favourite of courts of equity, and equity has sought by the most stringent rules to protect a *cestui que trust* against the *mala fides* or carelessness of his trustee. In furtherance of this object, the doctrine was early established in equity, that if a trustee for sale had to pay over the purchase-money to other persons in given shares, the purchaser was bound to see that the trustee applied the purchase-money accordingly, unless the instrument by which the trust was created contained a declaration that the trustee's receipt should be a good discharge. In the absence of such a declaration, the trustee was considered as not to be trusted, and the purchaser, unless he looked after him, was himself responsible for the misapplication of the money. This rule bearing very hardly on purchasers, and mortgagees who are purchasers *pro tanto*, and being in the way of that unfettered disposition of property which the law so much encourages, several legislative Acts have been passed relieving a purchaser of the most onerous part of his liability. It will be profitable, however, firstly to state the rules by which the purchaser's liability is regulated in cases not governed by the statutes.

IX. *Liability of purchaser to see to the application of purchase-money, where there are cestuis que trustent.*

1. As it is a general rule at common law that personality constitutes the natural and primary fund for the payment of the debts of the testator, the purchaser of the whole or any part of it was not bound to see that the purchase-money was applied by the executors in discharge of the debts (p). But even in this case, if there be fraud on the part of the purchaser, he will

(1.) *Personality — purchaser exonerated.*

(o) *Willis v. Kymer*, 9 Ch. Div. 187.

(p) *Ewer v. Corbet*, 2 P. W. 149; *Keane v. Robarts*, 4 Mad. 356.

not be exonerated, as where an executor disposes of his testator's assets in payment of a debt of his own (q).

(2.) Realty,—  
(a) trust or charge for payment of debts and legacies generally,—purchaser exonerated.

2. Where real estate is devised to trustees upon trust, to sell for payment of debts, or debts and legacies generally, or if the lands are merely *charged* with such payment, the purchaser is exonerated (r).

(b) Trust for payment of certain debts, or legacies only,—purchaser not exonerated.

3. But if the trust directs lands to be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, or if there is a trust for payment of legacies or annuities only, the purchaser is bound to see to the proper application of the purchase-money (s).

Lord St.  
Leonards' Act,  
22 & 23 Vict.,  
c. 35,—purchase or mortgage money only.

By stat. 22 & 23 Vict., c. 35, s. 23, it is enacted that "the *bonâ fide* payment to, and the receipt of, any person to whom any *purchase* or *mortgage* money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security" (t).

Lord Cranworth's Act,  
23 & 24 Vict.,  
c. 145,—any trust money whatsoever.

By 23 & 24 Vict., c. 145, s. 29, it is further enacted that "the receipts in writing of any trustees or trustee for ANY money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be re-

(q) *Hill v. Simpson*, 7 Ves. 152; and see *Pearson v. Scott*, 9 Ch. Div. 198.

(r) *Elliot v. Merryman*, 1 L. C. 64; *Jebb v. Abbot*, cited Co. Litt. 290 b.; *Dowling v. Hudson*, 17 Beav. 248.

(s) *Elliot v. Merryman*, 1 L. C. 64; *Johnson v. Kennett*, 3 My. & K. 630.

(t) *Bennett v. Lytton*, 2 J. & H. 158.

ceived, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof."

The 23d section of Lord St. Leonards' Act is considered to be not retrospective, and therefore to apply only to instruments executed since August 13, 1859, the date of the passing of the Act; and the operation of Lord Cranworth's Act is, by section 34 of that Act, expressly confined to instruments coming into operation after August 28, 1860. The distinctions, therefore, which have been taken above, as to the liability of purchasers to see to the application of their purchase-money, will still apply in all cases arising under deeds or wills executed before the respective dates of those acts (*u*).

With regard to the provisions of these statutes, it is necessary to bear in mind the difference between a charge of money on lands, and a trust or power to raise the same by sale. In the former case it was held that, though the owner of the lands was not a trustee, nor the owner of the money a *cestui que trust*, yet where lands so charged were sold, the purchaser was no less obliged to see to the application of his purchase-money, than if he had bought under an express trust or power. The only exception to this rule was, as we have already seen, where there was a general charge of debts. Now, however, purchasers of land, subject to a charge, are exonerated from liability, to a limited extent, under the nextly mentioned Act, that is to say,

By Lord St. Leonards' Act, sec. 14, where by a Devises in

---

(*u*) Dart's V. & P. 4th ed. p. 546.

trust subject to a charge may sell or mortgage without an express power; will coming into operation after the passing of the Act (v), a testator charges his real estate with the payment of his debts, or any legacy or specific sum of money, and devises the estate so charged to any trustee or trustees for the whole of his interest, and does not make any express provision for the raising of such debts, legacy, or sums of money, the devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, may raise the same either by actual sale or by mortgage; and this power is by the 15th section extended to all succeeding trustees taking the estate by survivorship, descent, or devise, or by appointment whether under the will or by the Court of Chancery. By the 16th section, where the estate subject to the charge is not devised to trustees for the testator's whole interest, the executor or executors have a similar power of raising the amount of the charge by sale or mortgage.

And failing them, the executors may do so.

By section 18, it is enacted that the provisions contained in sections 14, 15, and 16, shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

But neither trustees nor executors may do so, if tenant in fee' able and willing to sell.

Since the change effected by this enactment, questions as to the power to give receipts, and liability to see to the application of the purchase-money, have for the future become of little practical importance. To quote the words of a learned writer, "In cases falling within the 14th and 16th sections of the Act, the testator, or the legislature on his behalf, has created a fiduciary power. A charge in words has now become a trust in effect. The creditors have persons appointed

General conclusion on the Acts.

---

(v) i.e., after 13th August 1859.

to look after them; and the trustees and executors, when they agree to act under the will, undertake an express trust; and such a trust as, it is presumed, would enable them (even should legacies only be charged) to give an effectual receipt under the 29th section of the Act 23 & 24 Vict., cap. 145 " (*w*) ; but this (so far as regards the charge of legacies alone) is doubtful; and it would be only prudent to require the legatees who have charges on the land to concur in the conveyance for the purpose of releasing their charges.

---

(*w*) Wms. Real Assets, p. 90; and see Dart's V. & P. 4th ed. p. 564.

## CHAPTER III.

## EXPRESS PUBLIC [OR CHARITABLE] TRUSTS.

Charities  
favoured by  
the law.

CHARITIES are in general highly favoured in the law, and charitable gifts have accordingly sometimes received a more liberal construction than gifts to individuals. But in certain other respects charities are treated on the same level as private individuals; and in one respect to be hereafter specified, charities are treated with some little disfavour. We shall consider those various respects in the order above enumerated.

I. Respects  
in which  
charities are  
favoured,—

Firstly, charities are sometimes favoured above individuals :

(1.) General  
intention effec-  
tuated.

(1.) Thus, if the testator has expressed an absolute intention to give a legacy to charitable purposes, but he has left uncertain, or to some future act, the mode by which his intention is to be carried into effect, the Court of Chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity (*a*). *Nota bene*, that the *cestui que trust*, if a private individual, would, in such a case, lose the benefit of the trust, on the ground of uncertainty in the object.

If gift be for  
charity, equity  
will effectuate  
it at all events.

It is, in fact, a well-established principle that if the bequest be for a charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are *in esse* or not, or whether the legatee be a corporation capable in law of taking or not,

---

(a) *Pocock v. Att.-Gen.*, L. R. 3 Ch. Div. 342.



or whether the bequest can be carried into operation or not; for in all these and the like cases, the Court of Chancery will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit. But the object must be distinctly charitable, in order to the court construing it in that favourable way; and therefore where the bequest may, in conformity to the express words of the will, either be disposed of in charity of a discretionary private nature, or be employed for any general, benevolent, or useful purpose, or for any general purpose, whether charitable or otherwise, or for charitable or other general purposes at discretion, the bequest will be void, as being not exclusively charitable, and also too general and indefinite for the Court of Chancery to execute. Hence, if a man bequeaths a sum of money to such charitable uses as he shall direct, by codicil annexed to his will, or by note in writing, and he leaves no direction by codicil or note or writing, the Court of Chancery, applying the rule that the nomination of the particular objects is only the mode, and the gift to the charity the substance, of the testamentary disposition, will carry into effect the general intention of charity. But, if a testator makes a bequest to trustees for such benevolent, religious, and charitable purposes, or for such charitable or public purposes, as they should in their discretion approve of, the legacy cannot be supported, and the property devolves on the next of kin of the testator (b).

But the object must be distinctly charitable.

(1a.) Where the literal execution of the trusts of a charitable gift becomes inexpedient or impracticable, the court will execute them *cy-pres*, i.e., as nearly as it can to the original purpose, so as to execute them, (1 a.) Doctrine of *Cy-pres*.

(b) *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *Ellis v. Selby*, 1 My. & Cr. 286; *Bates v. Eley*, L. R. 1 Ch. Div. 473; *In re Jarman's Estate*, *Leaver v. Clayton*, 8 Ch. Div. 584, and compare *Cocks v. Mannors*, L. R. 12 Eq. 574, distinguished in *Re Dutton*, 4 Exch. Div. 45.

Applies only where there is a general intention of charity.

although not in mode, yet in substance. The general principle upon which the court acts is thus laid down by Lord Eldon in the leading case of *Moggridge v. Thackwell* (c), viz., "that if the testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." Thus, where there was a bequest of the residue of the testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey and Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards poor and destitute freemen of the company; there being no British slaves in Turkey and Barbary, the court directed a new scheme to be framed *cy-pres*, and approved of a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts (d).

Limit to the *Cy-pres* doctrine.

The doctrine of *cy-pres*, it will be seen, is held to be only applicable where the testator has manifested in his will a *general* intention of charity, and therefore will not be applicable whenever such general intention is not to be found. If, therefore, it is clearly seen that the testator had but one *particular* object in his mind, as, for example, to build a church at W., and that purpose cannot be answered, the next of kin will take (e).

(2.) Defects of

(2.) In farther aid of charities, the court will supply

(c) 7 Ves. 69; and see *In re Williams*, L. R. 5 Ch. Div. 735; *In re Birckett*, 9 Ch. Div. 576.

(d) *Att.-Gen. v. The Ironmongers' Co.*, 2 Beav. 313.

(e) *Clark v. Taylor*, 1 Drew. 642; *Loscombe v. Wintringham*, 13 Beav. 87.

all defects of conveyances, where the donor hath a conveyance capacity and a disposable estate, and his mode of <sup>supplied.</sup> donation does not contravene the provisions of any statute (*f*). *Note here*, that in the case of private individuals the imperfection of the conveyance, being voluntary, would be fatal to the creation of the trust.

3. A third respect in which charities are favoured (3.) Resulting trusts in gifts to charities. is in respect of resulting trusts. The following rules as to resulting trusts in gifts to charities are laid down in Lewin on Trustees (*g*).

(*a.*) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects (*h*), or such as do not exhaust the proceeds (*i*), the court will not suffer the property, in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied. (*a.*) Where a general charitable intention, no resulting trust.

(*b.*) Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but in consequence of an increase in the value of the estate, an excess of income subsequently arises, the court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*j*). (*b.*) So too where rents are exhausted by the object indicated but subsequently increase.

(*f*) St. 1171; *Sayer v. Sayer*, 7 Hare, 377; *Innes v. Sayer*, 3 Mac. & G. 606.

(*g*) Pp. 130, 131.

(*h*) *Att.-Gen. v. Herrick*, Amb. 712.

(*i*) *Att.-Gen. v. Tonna*, 2 Ves. Jr. 1.

(*j*) *Thetford School Ca. & Rep.* 130 b; *Beverley v. Att.-Gen.* 6 H. L. Cas. 310; *Att.-Gen. v. Caius College*, 2 Kee. 150; *Att.-Gen. v. Marchant*, L. R. 3 Eq. 424.

Exception,—  
where rents are  
not exhausted  
at time of gift.

But to these two rules, there is the following exception, viz., even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances, either result to the heir-at-law (*k*), or belong to the donee of the property, subject to the charge (*l*).

II. Respects in  
which charities  
are treated on  
a level with  
private  
individuals.  
(1.) Want of  
executor  
supplied.

Secondly,—Charities are sometimes treated on a level exactly with individuals.

(1.) Thus, if a testator gives his property to such person (upon trust) as he shall hereafter name to be his executor, and afterwards he appoints no executor; or if an estate is devised (upon trust) to such person as the executor shall name, and no executor is appointed; or if, an executor being appointed, he dies in the testator's lifetime, and no other is appointed in his place; in all these cases, if the bequest be in favour either of a charity or of an individual, the Court of Chancery will assume the office of an executor, and carry into effect that bequest; *scilicet*, because the beneficiary is certain, although the legal owner is uncertain (*m*).

(2.) Lapse of  
time a bar.

(2.) And to give another instance of the equal treatment of charities and individuals, lapse of time in equity is a bar, in the case of charitable trusts, exactly as it is (where it is) in cases of mere private trusts and no further; but, of course, where there is a breach of trust of which the purchaser has notice, lapse of time is no bar either in the case of charities or in the case of individuals; and under the Judicature Act, 1873,

(*k*) *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 308.

(*l*) *Beverley v. Att.-Gen.* 6 H. L. Cas. 310; *Att.-Gen. v. Southmoulton*, 5 H. L. Cas. 1; *Att.-Gen. v. Trin. Coll. Camb.* 24 Beav. 383.

(*m*) *Mills v. Farmer*, 1 Mer. 55, 96; *Moggridge v. Thackwell*, 7 Ves. 36.

sect. 25, sub-sect. 2, as between an express trustee and his *cestui que* trust, no lapse of time is a bar in respect of a breach of any such trust. Thus, in the case of a charitable trust, where a corporation had purchased *with notice of the trust*, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts (*n*).

Thirdly,—It remains to specify the one respect in which charities are treated with disfavour, compared with individuals. It is this:—

III. One respect in which charities are disfavoured,—

Assets will not be marshalled by a court of equity in favour of a charity. Thus, if a testator give his real and personal estate (consisting of personalty savouring of reality, as leaseholds, and also, of pure personalty) to trustees, upon trust to sell and pay his debts and legacies, and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savouring of reality, in order to leave the pure personalty for the charity (*o*). The rule of the court in such cases is, to appropriate the fund, as if no legal objection existed, as to applying any portion of it to the charity legacies: and then to hold such proportion of the charity legacies to fail, as would in that way fall to be paid out of the prohibited fund (*p*). But, of course, although the court will not itself marshal, the testator may direct his property to be marshalled, and the court is then most ready to carry out his directions most favourably for the charity (*q*).

Assets not marshalled in favour of charities.

Unless by express direction of the testator.

(*n*) *Att.-Gen. v. Christ's Hospital*, 3 My. & K. 344.

(*o*) *Fourdrin v. Gowdey*, 3 My. & K. 397.

(*p*) *Williams v. Kershaw*, 1 Keen, 274 *n*.; *Robinson v. Governors of the London Hospital*, 10 Hare, 19; Tudor's L. C. in Real Prop. 491.

(*q*) *Miles v. Harrison*, L. R. 9 Ch. App. 316; and see *Champney v. Davey*, W. N. 1879, 27.

## CHAPTER IV.

## IMPLIED AND RESULTING TRUSTS.

**Implied trusts.** AN implied trust, as the name denotes, is a trust which is founded on an unexpressed but presumed, *i.e.*, implied, intention of the party creating it. Implied trusts are often called resulting trusts; but besides resulting trusts, all of which are implied trusts, there are other implied trusts that are not, strictly speaking, resulting trusts.

The following are the principal instances of implied trusts, viz.—

(1.) Resulting trust to purchaser upon conveyance to stranger.

(1.) Resulting trust to purchaser of property conveyed or assigned to a stranger, *i.e.*, third person.

“The clear result of all the cases is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others, or in the names of others without that of the purchaser, whether in one name or in several, and whether jointly or *successive*, results to the man who advances the purchase-money; and it goes in strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor” (a). To illustrate this statement of the doctrine—Suppose A. advances the purchase-money of a freehold, copyhold, or leasehold estate, and a conveyance surrender or assignment of the legal interest in it is made either to B., or to B. and C., or to A., B., and

(a.) In case of lauds.

---

(a) *Dyer v. Dyer*, 1 L. C. 223.

C. jointly, or to A., B., and C. successively; in all these cases a trust will result in favour of A.

This doctrine is applicable to personal, as well as to real estate (b).

(b.) In case of chattels, or personal estate.

The doctrine of resulting trusts is applicable also to cases where two or more persons advance the purchase-money jointly, but the purchase is taken in the name of one of them; for there will be in that case a resulting trust in favour of the other proportioned to the money which he has advanced (c).

If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made (d). It has been objected that the admission of such evidence would be contrary to the Statute of Frauds; but it will be seen that the trust which results to the person paying the purchase-money and taking a conveyance in the name of another is a trust resulting by operation of law, and trusts of that nature are expressly excepted from the statute (e). And a further and better reason for admitting the evidence is, that it is used for the purpose of showing that the nominal or ostensible purchaser in the deed was but the nominee or agent of the true purchaser, for which purpose, parol or extrinsic evidence was always admissible, and still is so, notwithstanding the Statute of Frauds (f).

Parol evidence is admissible to show actual purchaser.

But no trust will result where the policy of an Act But not so as

---

(b) *Ebrand v. Dancer*, 2 Ch. Ca. 26.

(c) *Wray v. Steele*, 2 V. & B. 388.

(d) *Ryall v. Ryall*, 1 Atk. 59; *Lench v. Lench*, 10 Ves. 511, 517; *Bartlett v. Pickersgill*, 1 Eden. 515.

(e) 29 Car. II. c. 3, s. 8.

(f) *Higgins v. Senior*, 8 Mee. & W. 834.

to defeat the policy of the law.

of Parliament would be thereby defeated, as where the subject matter of the conveyance is a British ship, or land qualifying the grantee to vote for a Member of Parliament (*g*).

Resulting trust may be rebutted by evidence of purchaser's intention.

Resulting trusts, moreover, as they arise from an equitable presumption, may be rebutted by parol evidence, showing it was the intention of the person who advanced the purchase-money that the person to whom the property was transferred should take for his own benefit (*h*).

The presumption of advancement.

And where the purchaser is under a legal, or, in certain cases, a merely moral obligation to maintain or otherwise provide for the person in whose name the purchase is made, equity will raise a presumption that the purchase was intended as an advancement. Therefore, as to purchases made in the name of children or of persons similarly favoured, it may be laid down as a general rule that there will *prima facie* be no resulting trust for the purchaser, but, on the contrary, a presumption arises that an advancement was intended.

In whose favour it will be raised.

(*a.*) In whose favour this presumption will be raised.

1. Legitimate child.

1. In favour of a legitimate child (*i*).

2. One to whom the purchaser has placed himself *in loco parentis*.

2. The presumption may also arise in favour of any person with regard to whom the person advancing the money has placed himself *in loco parentis*; thus, in *Beckford v. Beckford* (*j*), an illegitimate son, in *Ebrand*

(*g*) *Ex parte Yallop*, 15 Ves. 68; *Groves v. Groves*, 3 Y. & J. 163, 175; *Childers v. Childers*, 1 De G. & Jo. 482.

(*h*) *Deacon v. Colquhoun*, 2 Drew. 21; *Wheeler v. Smith*, 1 Giff. 300; *Lane v. Dighton*, Amb. 409.

(*i*) *Sidmouth v. Sidmouth*, 2 Beav. 447; *Dyer v. Dyer*, 2 Cox, 92.

(*j*) Lofft. 490.



v. *Dancer* (k), a grandchild, whose father was dead (l), and in *Currant v. Jago* (m), the nephew of a wife, were held entitled to property purchased in their names, from the presumption of advancement being intended. But it has been held in a recent case that the mere fact that a person has placed himself *in loco parentis* towards the illegitimate child of his daughter did not alone raise a presumption of advancement in his favour. Wood, V. C., said,—“The Court has never yet held that any presumption of advancement arose merely from the fact of so distant a relationship (if it be a relationship) as this, nor yet *merely* from the fact that one of the parties was *in loco parentis* to the other. Here I am asked to conjoin both the doctrines, and out of the weak parts of both to make one strong chain, and hold that the testator was under the obligation of making provision for an illegitimate grandchild, whom he was not under any obligation, moral or legal, to support, and whose father was alive, merely on the ground that he had voluntarily brought up and educated him” (n).

3. The presumption also arises in favour of a wife (o). 3. A wife. But it will not arise when the purchaser makes the purchase in the names of himself and a woman, or in the name of the woman alone, with whom he has contracted an illegal marriage, as in the case of a marriage with a deceased wife's sister (p), or with whom he has contracted no marriage at all, as in the case of a mere mistress or concubine or kept woman (q).

In *Drew v. Martin* (r), a husband entered into an

(k) 2 Ch. Ca. 26.

(l) See *Soar v. Foster*, 4 K. & J. 152.

(m) 1 Coll. C. Ca. 261.

(n) *Tucker v. Burrow*, 2 H. & M. 515; *Forrest v. Forrest*, 13 W. R. 380.

(o) *Drew v. Martin*, 2 H. & M. 130; *In re Eykyn's Trusts*, L. R. 6 Ch. Div. 115.

(p) *Soar v. Foster*, 4 K. & J. 152.

(q) *Rider v. Kidder*, 10 Ves. 360.

(r) 2 H. & M. 130.

agreement for the purchase of land in the name of himself and his wife, and died before the whole of the purchase money was paid. *Held*, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate.

*Re De Visme*,  
—no presumption against a mother in favour of her children.

In *re De Visme* (s), it was decided that where a married woman had, out of her separate property, made a purchase in the name of her children, no presumption of advancement arose; inasmuch as a married woman was under no obligation, as the law then stood, to maintain her children (t); and, in the general case, the decision of the court would be the same still, notwithstanding that by the Married Woman's Property Act, 1870 (33 & 34 Vict., c. 93), a married woman having separate property under that Act is now laid under some liability to maintain her lawful children (u).

The presumption is rebuttable by parol evidence.

His contemporaneous acts and declarations are evidence both for and against the purchaser.

The presumption of advancement being an equitable presumption, may be rebutted by parol evidence. "The advancement of a son is a mere question of intention, and, therefore, facts antecedent or contemporaneous with the purchase, or so immediately after it as to constitute a part of the same transaction, may properly be put in evidence for the purpose of rebutting the presumption" (v). In *Williams v. Williams* (w), it was objected that a parol declaration by the father at the time that he intended the son to hold as trustee, amounted to the *creation* of a trust in his own favour, and was therefore by the Statute of Frauds rendered inadmissible. But this objection was thus

(s) 2 De G. Jo. & S. 17.

(t) *Holt v. Frederick*, 2 P. Wms. 356.

(u) *Bennett v. Bennett*, 10 Ch. Div. 474.

(v) *Lewin on Trustees*, 136; *Tumbridge v. Care*, 19 W. R. 1047; but see *Devoy v. Devoy*, 3 Sm. & Giff. 403.

(w) 32 Beav. 370.

answered: that "as the trust would result to the father, were it not rebutted by the son-ship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration" (v).

A *fortiori* parol evidence may be given by the son to show the intentions of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption (w).

The act and declarations of the father *subsequent* to the purchase may be used in evidence against him by the son, although they could not be used by the father against the son (x); and the better opinion seems to be, that the subsequent acts and declarations of the son can be used against him by the father, where there is nothing showing the intention of the father at the time of the purchase sufficient to counteract the effect of those declarations (y). For example, the presumption of advancement will not be rebutted by the mere circumstance that the father retains the property under his control, or that he receives the rents and profits, or interest, even though the son were no longer an infant (z).

His subsequent acts and declarations are evidence against but not for the purchaser.

(2.) Resulting trust of unexhausted residue. A very common case of resulting trust arises where a settlor conveys property on trusts which do not exhaust the whole property; in that case, as to so much of the property respecting which no trust is declared,

(2.) Resulting trust of unexhausted residue.

(v) *Lewin on Trustees*, 144.

(w) *Lamplugh v. Lamplugh*, 1 P. Wms. 113.

(x) *Reddington v. Reddington*, 3 Ridg. P. C. 195, 197.

(y) *Sidmouth v. Sidmouth*, 2 Beav. 455; *Scawin v. Scawin*, 1 Y. & C. C. 65.

(z) *Sidmouth v. Sidmouth*, 2 Beav. 447; *Grey v. Grey*, 2 Swanst. 594; *Williams v. Williams*, 32 Beav. 370. Distinguish *Bone v. Pollard*, 24 Beav. 283.

there will be a resulting trust in favour of the settlor (a), and if he is dead, then as regards the realty in favour of his heir or residuary devisee, and as regards the personalty in favour of his next of kin or residuary legatee. And the same rule would apply to a testator giving property by will.

Trustee cannot generally take beneficially.

Devise with a charge,—devisee takes beneficially. Devise on trust,—devisee takes no benefit.

It is a leading rule with regard to resulting trusts, where property is given simply upon trust, that the trustee is excluded by that fact from taking beneficially, in case of failure of the whole or part of the purpose for which the trust was directed (b). Thus, in *King v. Denison* (c), in exemplifying the difference between a gift on trust and a gift vesting the beneficial interest in the donee, the judgment says,—“If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose alone. If the devise is on trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference; the former is a devise of an estate for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose with no intention to give him any beneficial interest; where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the donee of the legal estate the beneficial interest, if the whole is not exhausted by the particular purpose, the surplus goes to the devisee, as it is intended to be given to him.”

(a) *Parnell v. Hingston*, 3 Sm. & Giff. 344.

(b) 2 Sp. 225, 226.

(c) 1 Ves. & Bea. 272.

But suppose that a trust of property having been created does not exhaust the whole of it, and there is no one in whose favour the trust can result, *i.e.*, that as to realty the owner dies intestate and without heirs, and as to personalty he dies intestate and without any next of kin—who takes the property in each of these cases,—the crown or the trustee?

Death of settlor, or *cestui que trust* intestate and without representatives.

As to realty, in *Burgess v. Wheate* (d), A. being seised in fee *ex parte paternâ*, conveyed real estate to trustees, in trust for herself, her heirs, and assigns, to the intent that she should appoint, and for no other use whatsoever. A. died without having made an appointment, and without any heirs *ex parte paternâ*; it was held (under the old law) that the maternal heir was not entitled, and that there being a terre-tenant, the holder of the legal estate, the crown claiming by *escheat* had no right to a conveyance of the land, and that the trustees, therefore, took beneficially. On the same principle, where a mortgage *in fee* is made, and the mortgagor dies intestate and without heirs, the equity of redemption does not escheat, but belongs to the mortgagee, subject to the mortgagor's debts (e), and subject, of course, to his widow's right of dower, if he have left a widow.

As to realty, trustee takes beneficially, because, if trustee seised in fee, there is no escheat.

So also where mortgagee seised in fee.

As to personalty, the rule is very different. Under the circumstances stated, the crown, by virtue of its prerogative, may claim it as *bona vacantia* (f). But where the executor is executor simply, and not also a trustee by express creation of the testator, then it appears that in such a case, the executor may take or keep beneficially the unexhausted residue (g).

As to personalty, the crown takes as *bona vacantia*.

(d) 1 Eden, 177.

(e) *Beale v. Symonds*, 16 Beav. 406.

(f) *Taylor v. Haygarth*, 14 Sim. 8; *Middleton v. Spicer*, 1 Br. C. C. 201.

(g) See *Lewin on Trustees*, 50.

Executors took undisposed-of-residue before 1 Will. IV., c. 40. Except where excluded by testator's intention, express or implied.

Before the statute 1 Will. IV., c. 40, where a testator made no express disposition of the residue of his personal estate, the executors were at law entitled to such residue; and courts of equity so far followed the law as to hold the executors to be entitled to retain such residue for their own use, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein, in which latter case they were held to be trustees for the person or persons who would have been entitled to such estate under the statute of distributions, if the testator had died intestate. And equity laid hold of any circumstance or expression in the will, which might appear to rebut the presumption of a gift to the executors, and convert them into trustees. Thus the intention to exclude the executors from taking beneficially, was inferred from an express legacy being given to the executor, or where *equal* legacies were given to the executors, if more than one, but not if *unequal* legacies were given them (*h*).

(3.) Executors now trustees for representatives of deceased.

(3.) The last-mentioned statute, however, by way of furthering the views of the court of equity, enacts that as to wills made after the 1st Sept. 1830, the executors shall be deemed by courts of equity to be trustees for the persons (if any) who would be entitled, under the statute of distributions, in respect of any residue not expressly disposed of, unless it should appear by the will that the executors were intended to take such residue beneficially. Whereas before the statute the presumption was in favour of the executors, after the statute, the onus has been shifted on them, of proving that the testator intended them to take beneficially (*i*),—that is to say, as against the next of kin; for in such a case, the original presumption in favour

---

(*h*) *Lynn v. Beaver*, T. & R. 63; *Blinkhorn v. Feast*, 2 Ves. Sr. 26.  
 (*i*) *Harrison v. Harrison*, 2 H. & M. 237.

of the executor would, *semble*, remain as against the Crown (*j*).

(4.) Resulting trusts arising under the operation of the doctrine of conversion are another important group of implied trusts; they are fully considered in Chap. ix., *infra*, to which chapter the reader is referred.

(4.) Resulting trusts under the doctrine of conversion.

(5.) Implied trusts arising out of joint-tenancies remain to be considered. It is well known, that according to the maxim, "Equity follows the law," limitations which confer an estate in joint-tenancy at law have the same effect in equity, when there are no circumstances which afford grounds for departure from the rule of law; so that where two or more persons purchase lands, and advance the money in *equal* shares, and take a conveyance to themselves and their heirs, they will be joint-tenants in equity as at law, and upon the death of one of them the estate will go to the survivor (*k*). But equity, acting on the broad principle that equality is equity, leans strongly against joint-tenancy, with its one-sided right of survivorship: for though it is true that each joint-tenant may have an equal chance of being the survivor, and thus taking the whole, yet this is but an equality in point of chance: as soon as one dies there is an end to the equality between them; on that event the whole accrues to the survivor. And the equal certainty of having an absolute equal share, or a share proportionate to the amount of the purchase-money advanced, is considered the far higher and truer equity than an equal chance of having the whole or none of the property purchased (*l*). Joint-tenancy not being favoured in equity, courts of equity will therefore lay hold of almost any circumstances from which it can reasonably

(5.) Implied trusts arising out of joint-tenancies.

Equity leans against survivorship in joint-tenancy.

(*j*) See *Lewin on Trustees*, 50.

(*k*) Litt. s. 280.

(*l*) *Rigden v. Vallier*, 2 Ves. Sr. 258.

Slight circumstances defeat survivorship. be implied that a tenancy in common was intended, and will treat the surviving joint-purchaser as a trustee for the legal representatives of the deceased purchaser. Thus :—

(a.) Advance of purchase-money unequally. (a.) Where two or more persons purchase lands and advance the purchase-money in *unequal* proportions, and this appears on the deed itself, this makes them in the nature of partners; the survivor will be deemed in equity a trustee for the other, in proportion to the sum advanced by him (*m*); and where the purchase-moneys are advanced in *equal* proportions, it is only because, and only when, equity can find no sufficient circumstance of difference, that she reluctantly permits the survivorship-incident of joint-tenancy to have its way.

(b.) Joint-mortgage. (b.) Where money is advanced either in *equal* or in *unequal* shares, by persons who take a mortgage to themselves jointly, in equity there will be a tenancy in common (*n*).

(c.) No survivorship in commercial purchases. (c.) The same rule is uniformly applied to joint purchases in the way of trade, and for purposes of partnership, and for other commercial transactions, by analogy to, and in expansion and furtherance of, the great maxim of the common law :—*Jus accrescendi inter mercatores pro beneficio commercii locum non habet* (*o*).

Land devised in joint-tenancy. Where, however, land is not purchased but is devised to two persons as joint-tenants, who make no use of it for partnership purposes, they will not be held tenants in common in equity, unless they should have

(*m*) *Lake v. Gibson*, 1 L. C. 198.

(*n*) *Morley v. Bird*, 3 Ves. 631; *Robinson v. Preston*, 4 K. & J. 505.

(*o*) *Lake v. Gibson*, 1 L. C. 198; *Jeffereys v. Small*, 1 Vern. 217.



subsequently agreed so to hold ; but if it can be inferred from their mode of dealing with the property for a long period of time (*p*), *e.g.*, if they have used it for partnership purposes or have classed it in their yearly and other accounts as portion of the assets of the partnership, then indeed the general rule will apply, and the right of survivorship will be excluded.

---

(*p*) *Jackson v. Jackson*, 9 Ves. 591 ; *Morris v. Barrett*, 3 You. & J. 384 ; *Davies v. Games*, W. N. 1879, p. 145.

## CHAPTER V.

## CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust, as distinguished from both express and implied trusts, may be defined to be a trust which is raised by *construction* of equity, without reference to any intention of the parties, either expressed or presumed.

The following are the principal instances of constructive trusts, viz.:—

(1.) Equitable liens.

(1.) The doctrine of constructive trusts receives its most frequent illustrations in cases of what have been termed “equitable liens.” A lien is not, strictly speaking, a *jus in re*, nor yet is it merely a *jus ad rem*; that is, it is not a property in the thing itself, nor yet does it constitute a mere personal right of action for the thing. But it is a *charge* upon the thing, and a charge in the view only of the court of equity, being in that respect unlike a legal rent-charge which issues out of, and is in fact part and parcel of, the land.

(a.) Vendor's lien for unpaid purchase-money.

(a.) “Where the vendor conveys, without more, though the consideration is upon the face of the instrument, and by a receipt endorsed upon it, expressed to be paid, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and vendee, and persons claiming as volunteers, upon the doctrine of this court . . . though, perhaps, no actual contract has taken place, a lien shall prevail, in the one case, for the whole consideration; in

the other, for that part of the money which was not paid " (a).

As to what amounts to a waiver or abandonment of the lien the general rule is this,—that the abandonment by the vendor of his lien "is to depend, not upon the circumstance of taking a security, but upon the nature of the security as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, . . . of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual " (b).

Waiver or abandonment.

Lien not lost by taking a collateral security *per se*.

It is now settled that a mere personal security for the purchase-money, *e.g.*, a bond (c), or a bill, or a promissory-note (d), will not *per se* evidence an intention on the part of the vendor to waive his lien over the estate.

Bond.

Although the mere giving of a bond, bill, promissory-note, or covenant for the purchase-money, or the granting of an annuity, secured by bond or covenant (e), will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant, or annuity was *substituted* for the consideration-money, or was, in fact, the thing bargained for, the lien will be lost (f). Thus, in *Buckland v. Pocknell*, (g), A. agreed to sell an estate to B. for an annuity of £200, to be paid to him for life, and an annuity of £92, to be paid after his decease to his son, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuities to A. and his son, and covenanted to

True rule,—was the bond, &c., substitutive of, or only cumulative with, the lien?

*Buckland v. Pocknell*,—a case of substitution.

(a) Per Lord Eldon in *Mackreth v. Symmons*, 1 L. C. 330.

(b) *Mackreth v. Symmons*, 1 L. C. 334.

(c) *Collins v. Collins*, 31 Beav. 346.

(d) *Hughes v. Kearney*, 1 Sch. & Lefr. 134.

(e) *Clarke v. Royle*, 3 Sim. 499.

(f) 1 L. C. 353.

(g) 13 Sim. 406.

pay them; and by a conveyance of even date, but executed after the annuity deed, after reciting the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in consideration of the premises *and of the annuities having been so granted*, as thereinbefore recited, and of the payment of the mortgage-money, conveyed the estate to B. Upon the death of A., his son's annuity, which had been assigned to the plaintiff, became in arrear. Vice-Chancellor Shadwell held that there was no lien for the annuity. "The question," observed his Honour, "is whether it does not appear on the face of the deed that the party who contracted to sell the land has got *that which he contracted to have*. Adverting to the mode in which the conveyances are made, my opinion is, that it would be quite wrong, because it would be contrary to what appears to have been the agreement of the parties, to hold that after the deeds were executed any lien remained for the annuities. As there was a separate instrument, which was executed first, which contained a distinct grant of the two annuities, and covenants for payment of them; and as the conveyance was made expressly in consideration of that deed; *and as it was part of the express stipulation that the mortgage-money should be paid off, and, consequently, that the mortgagee should convey his estate to the purchaser*, it would be quite inconsistent with the mode in which the parties have dealt to say, that there is an ulterior latent equity for the purpose of securing the annuity in a manner in which neither party ever thought that it was to be secured; and it is evident that they did not think that it was to be so secured, from their having taken a specific security for it. In the case also of *Parrot v. Sweetland* (h), which came before me and Mr. Justice Bosanquet, when we had the honour of being Commissioners of the Great Seal, we affirmed the judg-

---

(h) 3 My. & K. 655.

ment of Sir J. Leach in a case where the cause of the transaction showed that the party had got *that for which he bargained*" (i).

When the vendor has a lien against the vendee for unpaid purchase-money, it binds the estate in the hands of the following individuals, viz. :—

1. The purchaser himself, and his heirs, and all persons taken under him or them as volunteers (j). Against whom the lien may be enforced.

2. Subsequent purchasers for valuable consideration who bought *with notice* of the purchase-money remaining unpaid (k); for notice, as we have seen, binds the conscience of the party to satisfy all prior equities subsisting against the estate. And even where the first purchaser has sold the estate to a *bonâ fide* second purchaser without notice, if the second purchase-money or part thereof has not been paid, the original vendor may proceed either against the estate for his lien, or against the second purchase-money remaining in the hands of such second purchaser for satisfaction; for, in such a case, the latter, not having yet paid his money, and getting notice of the lien before he pays it, becomes, in fact, a purchaser *with notice*, and with the usual consequence, viz., he takes the estate *cum onere* to the extent of the unpaid portion of the original purchase-money. And this proceeds upon a general ground, that where trust-money can be traced, it may be followed and applied to the purposes of the trust (l).

3. The assignees, *i.e.*, trustee, of a bankrupt, although

(i) *Dixon v. Gayfere*, 21 Beav. 118; *Dyke v. Rendall*, 2 De G. M. & G. 209; *In re Brentwood Brick and Coal Co.*, L. R. 4 Ch. Div. 562.

(j) *Mackreth v. Symmons*, 1 L. C. 357.

(k) *Walker v. Preswick*, 2 Ves. Sr. 622; *Hughes v. Kearney*, 1 Sch. & Lefr. 135; *Morris v. Chambers*, 29 Beav. 246.

(l) *Lench v. Lench*, 10 Ves. 511.

they may have had no notice of it; for the assignees, *i.e.*, trustee, in bankruptcy take subject to all the equities attaching to the bankrupt (*m*).

4. If the legal estate be outstanding, then as the second purchaser for value, whether with or without notice, has only an equitable interest, he will be postponed to the equitable lien, which comes earlier in date, in accordance with the maxim, "*Qui prior est tempore potior est jure.*"

Against whom  
the lien is not  
enforced.

On the other hand, the lien will not prevail against a *bond fide* purchaser for valuable consideration without notice, who has the legal estate in him (*n*), for here the maxim applies,—“Where the equities are equal the law shall prevail.”

Vendor may  
lose his lien  
by negligence.  
—*Rice v. Rice.*

And the first vendor may find his lien postponed through his own negligence. Thus in *Rice v. Rice* (*o*), certain leaseholds were assigned to a purchaser by a deed, which recited the payment of the whole purchase-money, and had the usual receipt endorsed on it; the title-deeds were delivered up to the purchaser. Some of the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deeds, the purchaser deposited the assignment and title-deeds with the defendants, with a memorandum of deposit to secure an advance, and then absconded without paying either the unpaid vendors or the equitable mortgagees. It was held that the defendants, the equitable mortgagees, although having only an equity, and although being posterior in point of date, were entitled to payment out of the estate in priority to the

---

(*m*) *Ex parte Hanson*, 12 Ves. 349; *Fawell v. Heelis*, Amb. 724.

(*n*) *Cator v. Pembroke*, 1 Bro. C. C. 302.

(*o*) 2 Drew. 73.

claim of the unpaid vendors for their lien, on the following grounds:—That though as equitable interests they were of equal worth in their abstract nature and quality, and would in the general case have been paid merely according to their order in point of time, still that the vendors had lost their priority by their own negligence; that “the vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most deliberate and solemn manner, both in the body and by a receipt endorsed, that the whole purchase-money had been paid; that they might have required that the title-deeds should remain in their custody, with or even without a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money; that they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity; that the defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser’s title; and that they had in effect by their own acts assured the mortgagee that as far as they (the vendors) were concerned, the mortgagor had an indefeasible title both at law and in equity” (*p*).

(*b*.) Corresponding to the lien of the vendor for his unpaid purchase-money, is the right of the vendee, to have a lien upon the estate in the hands of the vendor for the whole or part of his purchase-money prematurely paid (*q*); and this lien will exist not only as against the vendor, but also as against a subsequent mortgagee who had notice of the payments having been

(*b*.) Vendee's lien for prematurely paid purchase-money.

---

(*p*) *Wilson v. Keating*, 4 De G. & Jo. 588.

(*q*) *Wythes v. Lee*, 3 Drew. 396; *Turner v. Marriott*, L. R. 3 Eq. 744.

made (r), and in fact generally against all the like persons above enumerated against whom the vendor's lien would prevail. Nevertheless, an unpaid vendor is not a mere *bare trustee* before conveyance (s) within the meaning of the Vendor and Purchaser's Act, 1874.

(2.) Renewal of lease by trustee in his own name.

(2.) Another common instance of a constructive trust arises upon the renewal of leases; the invariable rule being that a lease renewed by a trustee or executor in his own name and for his own benefit professedly, although without fraud, and even upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to the old lease (t). And this rule is applicable also to persons having a limited interest in a renewable lease, as a tenant for life; if he renews it in his own name he will be held a trustee for those entitled in remainder (u). And the reason of this rule is obvious, that it is but fair, if a tenant for life, acting upon the goodwill that accompanies the possession, gets a more durable term, that he should hold it for the benefit of those in remainder (v). So likewise, if a partner renew a lease of the partnership premises on his own account, he will, as a general rule, be held a trustee of it for the firm (w), and the like rule applies to all persons occupying a fiduciary or quasi-fiduciary relation.

Or by tenant for life.

Or partner.

(3.) Allowance for payments where same are necessary and permanently beneficial.

(3.) A constructive trust may also arise where a person who is only part owner, acting *bond fide*, permanently benefits an estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improve-

(r) *Watson v. Rose*, 10 W. R. 745, 10 Ho. L. Ca. 672.

(s) *Morgan v. Swansea U. S. Authority*, 9 Ch. Div. 582.

(t) *Keech v. Sandford*, 1 L. C. 46.

(u) *Mill v. Hill*, 3 H. L. Cas. 828; *Yem v. Edwards*, 1 De G. & Jo. 598.

(v) *James v. Dean*, 15 Ves. 236.

(w) *Featherstonhaugh v. Fenwick*, 17 Ves. 311; *Olegg v. Fishwick*, 1 Mac. & G. 294; *Bell v. Barnett*, 21 W. R. 119.



ments (x). Thus it was intimated in *Neesom v. Clarkson* (y), that although a person expending money by mistake upon the property of another has no equity against the owner who was ignorant of and did not encourage him in his expenditure (z), yet if it were necessary for the true owner to proceed in equity he would only be entitled to its assistance, according to the ordinary rule, by doing equity and making compensation for the expenditure, so far, of course, and only so far as the expenditure was necessary, and has proved permanently beneficial. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title (a), or who lays out money unnecessarily and fancifully, extravagantly or improperly.

He who seeks equity must do equity.

So again, where a tenant for life, under a will, has gone on to finish permanently beneficial improvements to an estate which had been begun by the testator, courts of equity have deemed the expenditure a charge for which the tenant is entitled to a lien (b). Thus, in *Dent v. Dent* (c) a tenant for life had expended on the estate large sums,—(1) In completing a mansion-house, left unfinished by the testatrix; (2) In erecting a conservatory and vinery; (3) In rebuilding farmhouses, &c.; (4) In erecting cottages; (5) In erecting permanent furnaces, works, buildings, &c., at some copper works; (6) In draining marshy ground; and (7) In making payments to keep a foreign mine working so as to prevent its forfeiture; —it was held that he was entitled to no allowance for these sums out of the personal estate of the testatrix, held upon similar

Improvements by tenant for life.

(x) *Lake v. Gibson*, 1 L. C. 198.

(y) 4 Hare, 97.

(z) *Nicholson v. Hooper*, 4 My. & Cr. 186.

(a) *Rennie v. Young*, 2 De G. & Jo. 136; *Ramsden v. Dyson*, L.R. 1 H. L. 129.

(b) *Hibbert v. Cooke*, 1 Sim. & Stu. 552.

(c) 30 Beav. 363; and see *In re Leslie's Settlement Trusts*, L. R. 2 Ch. Div. 185.

trusts, or to any inquiry respecting them, excepting those laid out in the 1st and 7th of them, *i.e.*, in completing the mansion, and in keeping up the foreign mine, an inquiry being directed, whether the outlay on these two accounts, or either (and which?) of them, was or was not for the benefit of the inheritance (*d*).

Trustee has a lien on trust-fund for expenses of renewal.

A trustee, executor, or other fiduciary person who has renewed a lease has, however, a lien upon the estate for the costs and expenses of the renewal with interest (*e*).

Salvage-moneys on policy of insurance.

Similarly where payments have been made in order to prevent the lapse of a policy, the person making such payments is entitled to a lien for the amount on the proceeds of the policy, on the footing of salvage-moneys (*f*), but apparently to no other beneficial interest in the property.

(4.) Heir of mortgagee trustee for personal representatives.

(4.) When a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises descends, in case of intestacy, to his heir; but in equity the mortgaged estate being only a security for money, the heir or devisee will be held a trustee of the legal estate in the lands for the personal representatives of the deceased mortgagee for the purpose of securing them the mortgage moneys, to hand over or distribute among and through the persons entitled to the personal estate of the mortgagee (*g*); and now under the Vendor and Purchaser's Act, 1874 (*h*), the executor or administrator may himself reconvey the legal estate, on payment of the mortgage

---

(*d*) *Dunne v. Dunne*, 3 Sm. & Giff. 22. *In re Leigh's Estate*, L. R. 6 Ch. 887.

(*e*) *Holt v. Holt*, 1 Ch. Ca. 190; *Coppin v. Fernyhough*, 2 B. C. C. 291; and, as to renewal fund, see *Maddy v. Hale*, L. R. 3 Ch. Div. 327.

(*f*) *Norris v. Caledonian Insurance Company*, L. R. 8 Eq. 127; *Gill v. Downing*, L. R. 17 Eq. 316.

(*g*) *Thornbrough v. Baker*, 2 L. C. 1046.

(*h*) 37 & 38 Vict. c. 78, ss. 4, 5.

money, but of course should not do so if the locality of the legal estate is known, and there is no disability.

Before concluding this chapter, it may be usefully pointed out that the constructive trusts exemplified above are constructed by the court of equity in the following manner:—First of all, equity asks, Who has got the *legal* estate, *i.e.*, to whom does the property belong at law, apart from all equitable considerations? That matter being once ascertained, the court of equity acknowledges the legal ownership, and without impugning same welcomes it rather, and makes a foundation of it, upon which to build up, that is, to *construct* the trust for which it perceives an equity. Thus, in the case of the vendor's lien (being Constructive Trust, No. 1, *a*, *supra*), the court of equity finds the legal estate in the vendee, inasmuch as the vendor has already conveyed same to him; and then the court founds upon the vendee, *as having the legal estate*, the equitable lien or charge for the unpaid purchase-money. So again, in the case of the vendee's lien, (being Constructive Trust, No. 1, *b*) the court of equity finds the legal estate in the vendor, inasmuch as he has not yet conveyed same to the vendee; and then the court founds upon the vendor *as still having the legal estate*, the equitable lien or charge for the prematurely paid purchase-money. Similarly, in all the other cases,—it being, in fact, the rule of the court of equity to found upon the legal estate only,—a rule the forgetting or the ignorance of which occasions not only unnecessary difficulty to the student, but oftentimes mistakes in the conduct of actual legal business.

Equity's  
manner of  
constructing  
trusts,—ex-  
plained and  
illustrated.

## CHAPTER VI.

TRUSTEES AND OTHERS STANDING IN A FIDUCIARY  
RELATION.

Who may be  
trustees.

A TRUSTEE should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and should (for reasons of convenience) be domiciled within the jurisdiction of the English courts of equity (*a*). A corporation as to lands (*b*), a feme covert (*c*), and an infant (*d*), as to both real and personal estate, are, on account of their several disabilities, unsuited to hold, but none of them are incapable of holding the office of trustee. Since the Naturalisation Act, 1870 (*e*), an alien is apparently as capable as a native-born person of acting as trustee.

Equity never  
wants a trustee.

It is a general rule in courts of equity, that wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested (not being a *bonâ fide* purchaser for valuable consideration without notice, or otherwise entitled to protection) (*f*), to execute the trust. For it is a rule in equity which admits of

(*a*) *Lewin on Trustees*, 27.

(*c*) *Lake v. De Lambert*, 4 Ves. 595.

(*d*) *Hearle v. Greenbank*, 3 Atk. 712.

(*e*) 33 & 34 Vict. c. 14, s. 2; as to old law see Gilb. on Uses, 43; *Fish v. Klein*, 2 Mer. 431.

(*f*) *Thorndike v. Hunt*, 3 De G. & J. 563; *Salisbury v. Bagott*, 2 Swanst. 608.

(*b*) *Ibid.* 27, 29.

no exception, that a court of equity never wants a trustee. And this rule is applied where property has been bequeathed in trust, without the appointment of a trustee; if it is personal estate, the personal representative is deemed the trustee; and if real estate, the heir or devisee is deemed the trustee; and in either case, the trustee is bound to the due execution of the trust. The lapse of the legal estate never has the least influence upon the trusts to which it is subject; if the individuals named as trustees fail either by death, or by being under disability, or by refusing to act, the court will provide a trustee; if no trustees are appointed at all, the Court of Chancery assumes the office in the first instance; if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium appointed by the Court of Chancery. The trustee is, in fact, a mere machine, but a machine that acts according to the rules of equity, and departs therefrom at his own particular peril, although at the same time he is the servant of his *cestui que trust* for the time being. By "*cestui que trust*" is here meant, not one person having only a partial beneficial interest in the trust fund,—for the trustee is not the servant but the controller of such partiaary or partial beneficiary,—but the aggregate body of persons (born and unborn) that make up the entirety of the persons entitled, or who may be or become entitled, to any beneficial interest in the trust property as such. And even the person for whom he shall be trustee depends entirely upon the will of such *cestui que trust*, whether entitled under the original creation of the trust, or by subsequent devolution or transfer (*g*); and on the death of one trustee, the entire responsibilities survive (*h*).

In what sense the trustee is the servant, and in what sense the controller, of his *cestui que trust*.

The *cestuis que trustent*, or any one or more of them, Trustee may

(*g*) 2 Sp. 876; *Att.-Gen. v. Downing*, Wilm. 23.

(*h*) *Att.-Gen. v. Gleg*, 1 Atk. 356.

be compelled to any act of duty.

Or restrained from abuse of his legal title.

Trustee cannot renounce after acceptance.

are entitled to file a bill against the trustee, to compel him to the execution of any particular act of duty, and a fund in the hands of trustees may be bound by the act or assignment of any particular *cestui que trust* who is *sui juris* without the consent of the trustees, but only of course to the extent of the beneficial interest of such particular *cestui que trust* (i). If any *cestui que trust* has reason to suppose, and can satisfy the court, that the trustee is about to proceed to an act not authorised by the true scope of the trust, he may obtain an injunction from the court to restrain the trustee from such a wanton exercise of his legal power (j). A trustee who has accepted the trust cannot afterwards renounce it. The only mode in which he can obtain a release is either under the sanction of a court of equity, or by virtue of a special power in the instrument creating the trust, or with the consent of all parties interested in the estate, being *sui juris* (k); and of these three modes of release, the second one is usually the only one unattended with expense. As regards the first mode of release, the court will not sanction the release merely because the trustee wishes it; and as regards the third mode of release, it is rarely, if ever, the certain fact that all the *cestuis que trust* are *sui juris* or even yet in existence.

Trustee cannot delegate his office.

The office of trustee being one of personal confidence cannot be delegated. Trustees, who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons, and if they do so, they remain subject to responsibility towards their *cestui que trust* for whom

(i) *Donaldson v. Donaldson*, Kay, 711.

(j) *Balls v. Strutt*, 1 Hare, 146; *Lewin on Tr.* 613.

(k) *Manson v. Baillie*, 2 Macq. H. L. Cas. 80; *Lewin on Tr.* 204.

they have undertaken the duty (*l*). The incapacity of the trustee to delegate his office is to be understood of a trustee being and remaining one; because of course under a special power in that behalf, he may otherwise retire altogether from the trust and appoint a new trustee in his place, and in that way delegate (in one sense) the entire trust. But the trustee who does not resign altogether cannot delegate in part, for the reasons stated, and upon the maxim, "*Delegatus non potest delegare*," which although ridiculed by Bentham as a "fallacy of rhythm," is based and maintained in English law upon sound and enduring reasons.

But trustees and executors may justify their administration of the trust-fund by the instrumentality of others, where there exists a moral necessity for it. Necessity, which includes the *regular course of business*, will exonerate. Thus, if "an executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts, he is considered to do this of *necessity*, he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible when he remitted money to a person to whom he would on the like occasion have himself given credit, and would in his own business have remitted money in the same way" (*m*).

Delegation permitted where there is a moral necessity for it.

Trustees (whether or not being also executors) are bound to take the same care of trust property, as a man of ordinary caution would take of his own; and if they have done so they will not be liable for any

The care and diligence required of trustees, as regards,—

---

(*l*) *Turner v. Corney*, 5 Beav. 517; *Bostock v. Floyer*, L. R. 1 Eq. 26; *Eaves v. Hickson*, 30 Beav. 136.

(*m*) *Joy v. Campbell*, 1 Sch. & Lef. 341; *Clough v. Bond*, 3 My. & Cr. 497; *Ex parte Belchier*, Amb. 219.

*accidental* loss; as, for instance, by a robbery of the property while in their own possession (*n*), or by a robbery or loss, whilst in the possession of others with whom it has necessarily, *i.e.*, in the ordinary course of business, been entrusted (*o*). But the court, in determining the liability or non-liability of a trustee for any loss sustained by the trust estate, distinguishes between the *duties* imposed upon and the *discretions* vested in him as such. And as regards his *duties*, the utmost diligence in observing same (*i.e.*, *exacta diligentia*) is his only protection against liability for any loss; while as regards his *discretions*, or discretionary powers, an amount of diligence equal to what he bestows on his own property will protect him from liability. Thus, firstly, as regards *duties*, if a trustee or executor permit the trust-fund to remain unnecessarily, or contrary to his duty, in the hands of third parties, as, for instance, if money be left in the hands of a banker more than a year after the testator's death, and after the debts, &c., have been paid (*p*); or if a trustee mix trust property with his own (*q*), or parts with his exclusive control over the fund, by associating with himself the authority of another person (*r*); or if the fund be left to the entire control of a co-trustee (*s*), it will be at his risk (*t*). But, secondly, as regards *discretions*, *e.g.*, if, under the investment clause in the will or settlement, he has the power of investing in any one or more at his discretion of certain specified funds comprising good, bad, and indifferent securities, and he invests (say, at the request of an importunate *cestui que trust*) part of the trust funds in Turkish Bonds as being one of the authorised invest-

(a.) Duties.

(b.) Discretions.

---

(*n*) *Morley v. Morley*, 2 Ch. Ca. 2.

(*o*) *Jones v. Lewis*, 2 Ves. 240; *Swinfen v. Swinfen*, 29 Beav. 211.

(*p*) *Darke v. Marlyn*, 1 Beav. 525.

(*q*) *Lupton v. White*, 15 Ves. 432.

(*r*) *Salway v. Salway*, 2 Russ. & My. 215.

(*s*) *Clough v. Bond*, 3 My. & Cr. 490.

(*t*) *Castle v. Warland*, 32 Beav. 660; *Lunham v. Blundell*, 27 L. J. Ch. 179; *Matthews v. Brise*, 6 Beav. 239; 22 & 23 Vict., c. 35, s. 31.



ments, then he will be liable, if he would not have invested his own moneys in that class of investment; but otherwise he will not be liable, even in the case of a loss to the trust estate (*u*).

It is an established rule that trustees, executors, or administrators, or others standing in a similar situation, shall have no allowance for their care and trouble, and this proceeds upon the well-known principle of equity, that a trustee shall not profit by his trust (*v*). So strict is this rule, that although a trustee or executor may, by the direction of the author of the trusts, have carried on a trade or business at a great sacrifice of time, he will be allowed nothing as compensation for his personal trouble or loss of time (*w*). And a solicitor, who is a trustee, is not entitled to charge for business done by him in relation to the trust, except for his costs out of pocket only, unless there is a provision in the instrument creating the trust, enabling him to receive remuneration for the transaction of such business (*x*), and even where a solicitor is appointed executor, and is to be "at liberty to charge for professional services, he can only charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as for attendances to pay premiums on policies, or attending at the bank to make transfers, &c. (*y*),—wherefore the will or settlement should give to the solicitor-trustee a wide liberty in this respect, extending as well to professional business as also to business in and about the trust although not strictly professional.

No remuneration allowed to trustee.

Solicitor-trustee allowed only for costs out of pocket.

---

(*u*) *Tabor v. Brooks*, 10 Ch. Div. 273; *In re Norrington*, *Bindley v. Partridge*, W. N. 1879, 37.

(*v*) *Robinson v. Pett*, 2 L. C. 207; *Hamilton v. Wright*, 9 Cl. & F. 111.

(*w*) *Brocksopp v. Barnes*, 5 Madd. 90.

(*x*) *Broughton v. Broughton*, 5 De G. M. & G. 160.

(*y*) *Harbin v. Darby*, 28 Beav. 325.

Trustees may stipulate to receive compensation.

Although trustees or executors will not in general be entitled to any allowance for their trouble, there is nothing to prevent them contracting with their *cestui que trust*, to receive some compensation for the performance of the duties of the trust. But such a contract would be very jealously scrutinised by a court of equity, and if there be any appearance of unfairness, or unconscionable advantage on the part of the trustee, the agreement will not be enforced (z).

Trustee must not make any advantage out of his trust.

In further illustration of the maxim that a trustee shall not make a profit by his trust, may be mentioned those cases where one, in a fiduciary position, uses that position as a means of obtaining any profit or advantage which he would not otherwise obtain. It was upon this principle that Lord Eldon in one case directed an inquiry whether the liberty of sporting over the trust estate could be let for the benefit of the *cestui que trust*, and in the meantime the trustee was to appoint a gamekeeper for the preservation of the game, but was not to keep up an establishment for his, the trustee's, own pleasure (a).

(a.) Not enjoy the shooting.

(b.) Not charge more than he gave for the purchase of debts.

If trustees or executors buy up any debt or encumbrance to which the trust estate is liable, for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the advantage of it (b).

(c.) Not take trade profits, paying interest instead.

Again, if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust-money in a commercial adventure, as in fitting out a vessel for a voyage, or if he employ it in business, in all these

(z) *Ayliffe v. Murray*, 2 Atk. 58.

(a) *Webb v. Earl of Shaftesbury*, 7 Ves. 480-488.

(b) *Pooley v. Quilter*, 4 Drew. 184, 2 De G. & Jo. 327; *Fosbrooke v. Baiguy*, 1 My. & K. 226.

cases, while the executor or trustee is liable for all losses, the *cestui que trust* may insist either on having the trust-fund replaced with interest, or on having the profits made by the trust-funds so employed (*c*).

So, likewise, a person standing in a fiduciary relation towards another will not be allowed to benefit by his trust, by obtaining a renewal of a lease in his own name, but will be deemed in equity to be a trustee for those interested in the original term (*d*), nor will a trustee, as a general rule, be permitted to purchase the trust estate from his *cestui que trust* (*e*).

Trustee cannot renew lease in his own name.

Or purchase trust-estate.

The foregoing principles apply to constructive trustees, as agents (*f*), guardians (*g*), partners (*h*) directors of companies (*i*), and even promoters of companies (*j*), and generally, to all persons clothed with a fiduciary character. All such persons must refund all profits improperly made at the expense of the trust-estate, and will not be allowed, as a general rule, any remuneration for their trouble (*k*).

Same principles apply to agents, &c.

However, under exceptional circumstances, trustees and other persons standing in the like fiduciary relation, may effectively and securely purchase from their *cestuis que trustent*, e.g., (1) If the trustee will give more for the trust estate than any other purchaser, in other words, if he will give a "fancy-price" for it, or (2) If

Exceptional cases, in which trustee's purchase from *cestui que trust* holds good.

(c) *Docker v. Somes*, 2 My. & K. 655; *Townend v. Townend*, 1 Giff. 201; *Willett v. Blanford*, 1 Hare, 253.

(d) *Keech v. Sandford*, 1 L. C. 46.

(e) *Fox v. Mackreth*, 1 L. C. 123.

(f) *Morret v. Paske*, 2 Atk. 54; *Kimber v. Barber*, L. R. 8, Ch. 56; *Macpherson v. Watt*, 3 App. Ca. 254.

(g) *Powell v. Glover*, 3 P. W. 252 n.

(h) *Wedderburn v. Wedderburn*, 4 My. & Cr. 41.

(i) *Gt. Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586.

(j) *Bagnall v. Carlton*, 6 Ch. Div. 371; *New Sombbrero Co. v. Erlanger*, 5 Ch. Div. 73; 3 App. Ca. 1218.

(k) *Docker v. Somes*, 2 My. & K. 665; *Foster v. M'Kinnon*, 5 Gr. 510; *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189.

the offer to sell proceeds from the *cestuis que trustent*, and the trustee pays the ordinary value in the market, keeping (as it is absurdly said) his *cestuis que trustent* at arm's length, or (3) If the sale is by public auction, and the trustee has the leave of the court to bid,—then, and in any of these cases, the purchase by the trustee will hold good (l).

Constructive,  
not liable to  
same extent  
as express,  
trustee.

Remarks of  
Lord West-  
bury in *Knox*  
v. *Gye*.

Time runs in  
favour of con-  
structive  
trustee, al-  
though not  
in favour  
of express  
trustee.

Furthermore, if a person does not fill any expressly fiduciary character, as that of trustee or executor, but is merely a constructive trustee, his liabilities are in some respects different from those of an express trustee. His duties and responsibilities are matters of quasi-contract, and he is, as it appears, not bound by many of the rules which equity has annexed to the express fiduciary relation. The distinction is clearly drawn in Lord Westbury's judgment in *Knox v. Gye* (m). There it was attempted to be argued, that a surviving partner was a trustee of the share of his deceased partner, but his Lordship, after adverting to the case of vendor and purchaser, and stating, that there, though the vendor might by a metaphor be called a trustee, *he was a trustee only to the extent of his obligation to perform the agreement* between himself and the purchaser, proceeded as follows:—"In like manner here, the surviving partner may be called a trustee for the dead man, but the trust is *limited to the discharge of an obligation, which is liable to be barred by lapse of time*. As between the express trustee and *cestui que trust*, time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most important to mark this again and again, for there is not a more fruitful source of error in law than the inaccuracy of language. The application to a man, who is improperly and by metaphor only called a trustee, of all the consequences which would follow if he were a trustee by

(l) *Hickley v. Hickley*, L. R. 2 Ch. Div. 190.

(m) L. R. 5 H. L. 656, 675; *Noyes v. Crawley*, 10 Ch. Div. 31.

express declaration—in other words, a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Macclesfield, that nothing in law is so apt to mislead as a metaphor" (n).

Similarly, where a person is merely a constructive trustee, as having employed the money of another in a trade or business, although he must account for the profits of the money he has employed, he may have an allowance made to him for his loss of time and for his skill and trouble (o).

Constructive trustee may have remuneration for time and skill.

In *Townley v. Sherborne* (p), the extent of the responsibility of one trustee for the acts or defaults of his co-trustee was first discussed. A., B., C., and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and signed acquittances, but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands? After much consideration, the judges resolved:—That where lands are conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil-dealing appears to have been in them, to prejudice the trust, for they being by law joint-tenants,

One trustee is liable for his co-trustee, —practically.

(n) *Taylor v. Taylor*, 28 L. T. N.S. 189; *Edwards v. Warden*, 22 W. R. 669.

(o) *Brown v. Litton*, 1 P. W. 140; *Brown v. De Tastet*, Jac. 284; *Docker v. Somes*, 2 M. & K. 655.

(p) 2 L. C. 870; and see *Lewis v. Nobbs*, 8 Ch. Div. 591.

or tenants in common, every one by law may receive either all or as much of the profits as he can come by; it is no breach of trust to permit one of the trustees to receive all, or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits. But it was also resolved:—That if upon the proof of circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing (*q*). And it was, in fact, decided in *Townley v. Sherborne*, that if a trustee joined with his co-trustees in *signing receipts*, he was liable, even though he had received nothing,—the liability arising not from his mere signing of the receipts (because, of course, it was his duty to do that), but from his subsequently leaving in the hands of his co-trustees the money that had been received (which, as we have just seen, it was a violation of his duty to do).

“Signing for conformity,”  
—effect of  
(1.) By itself  
alone.

And, in fact, in later times the rule has been established that a trustee who joins in a receipt for conformity, but without receiving, shall not by that circumstance alone, be rendered liable for a misapplication by the trustee who receives, for “it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him, by his joining in the receipts, is but notional” (*r*). Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in this their joint capacity, and it would be tyranny to punish a trustee

(*q*) *Mucklow v. Fuller*, Jac. 198; *Booth v. Booth*, 1 Beav. 125.

(*r*) *Fellows v. Mitchell*, 1 P. W. 81; *In re Fryer*, 3 K. & J. 317.

for an act, which the very nature of his office will not permit him to decline (s),—*scil.*, where that act is not coupled with any breach of duty arising subsequently. At law, where trustees join in a receipt, *primâ facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him, to show that the money acknowledged to have been received by all, was in fact received by one, and he himself joined only for conformity (t). But that means of exoneration from subsequent loss is in general of little worth, the subsequent loss commonly proceeding from a subsequent neglect of duty by the non-receiving but signing trustee. For though a trustee is safe if he does no more than authorise the receipt and retainer of the money by his co-trustee, yet he will not be justified in allowing the money to *remain* in his hands for a longer period than the circumstances of the case reasonably require (u), *e.g.*, a fortnight's neglect may occasion all the loss.

(2.) When coupled with subsequent neglect of duty.

Co-executors on the other hand are generally answerable each for his own acts only, and not for the acts of their co-executors (v). For in respect of receipts, the case of co-executors is materially different from that of co-trustees, and this difference arises not from any principle, but from the different powers with which co-trustees and co-executors are respectively invested by the law, so that a particular circumstance which would afford a presumption of the performance of an act involving responsibility in the case of an executor, would not afford any presumption thereof in the case of a trustee. An executor has, independently of his

One executor not liable for his co-executor,—practically.

(s) Lewin, 215.

(t) *Brice v. Stokes*, 2 L. C. 877; 11 Ves. 319.

(u) *Brice v. Stokes*, *ubi supra*; *Thompson v. Finch*, 8 De G. M. & G. 560; *Walker v. Symonds*, 3 Swanst. 1; *Hanbury v. Kirkland*, 3 Sim. 265.

(v) *Williams v. Nixon*, 2 Beav. 472.

Onus on executor joining in receipt to prove that he did not receive.

co-executor, a full and absolute control over the personal assets of the testator, and is competent to give valid discharges by his own separate act. If, therefore, an executor join with a co-executor in a receipt, he does an *unnecessary* act, and will therefore be *primâ facie* answerable for the application of the fund (*w*). In *Westley v. Clarke* (*x*), this general rule was thus exemplified. T., one of three executors, had called in a sum of money, secured by mortgage of a term of years, and received the amount, and *afterwards*, but the same day, sent round his clerk to his co-executors, with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. T. afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors. Lord Northington said—"If it plainly appears that only one executor received and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason and without being in a capacity to control the act of their co-executor, either before or after the act was done, what ground has any court of conscience to charge them? The only act that affected the assets was the first that discharged the debt." His Lordship was therefore of opinion that the executors were not liable for the misapplication by their co-executor.

True rule as to receipts by executors.

The rule, as now recognised, is best explained by Lord Redesdale in *Joy v. Campbell* (*y*),—"The distinction," he observes, "seems to be this, with respect to mere signing; that if the receipt be given for the purpose of mere form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all

(*w*) *Brice v. Stokes*, 11 Ves. 319.

(*x*) 1 Eden 357.

(*y*) 1 Sch. & Lef. 341.



these cases seems to have been, whether the money was under the control of both executors" (z).

An express clause is usually inserted in trust-deeds, that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustees, but for his own acts and defaults only. But equity infuses such a proviso into every trust-deed (a), and a person can have no better right from the expression of that which, if not expressed, would be implied (b). And now, by Lord St. Leonards' Act (c), every instrument creating a trust shall be deemed to contain the usual indemnity and re-imbursement clauses, and therefore, in future, the express introduction of them into deeds and wills may be safely dispensed with. But it is to be noted, of course, that the very generality of the usual indemnity clause, augurs it of little worth as a protection,—as it does not extend to cover the trustee's neglect of a trustee's *duties*, one of which (as already shown) is not to leave the money in the sole control of his co-trustee.

That being so, it is not unusual to insert in deeds and wills an indemnity clause of somewhat wider reach. Thus, in the case of *Wilkins v. Hogg* (d), a testatrix, by her will in 1854, after appointing three trustees, declared each trustee should be answerable only for losses arising from his own default, and not for involuntary acts, or for the acts or defaults of his co-trustees; and particularly *that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of her will, should not be obliged to see*

Indemnity clauses,—utility of, in general.

*Wilkins v. Hogg*,—example of a very extensive indemnity clause.

(z) *Walker v. Symonds* 3 Swanst. 1; *Hovey v. Blakeman*, 4 Ves. 608.

(a) *Dawson v. Clarke*, 18 Ves. 254.

(b) *Worrall v. Harford*, 8 Ves. 8; *Rehden v. Wesley*, 29 Beav. 213.

(c) 22 and 23 Vict., c. 35, s. 31.

(d) 8 Jur. N.S. 25; 3 Giff. 116.

*to the due application thereof, nor should such trustee be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same moneys.* The three trustees joined in signing and giving receipts to two insurance companies for two sums of money paid by them, but two of the trustees permitted their co-trustee to obtain, and afterwards to retain, the money without ascertaining whether he had invested it. That trustee having misapplied the money, a bill was filed for the purpose of making his co-trustees personally liable. Lord Westbury, C., held that they were not liable. His Lordship said—"This clause excluded the possibility of any liability except for actual misappropriation. There were three modes in which a trustee would become liable according to the ordinary rules of law,—first, where, being the recipient, he hands over the money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress. The framer of the clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained, therefore, only personal misconduct, in respect of which a trustee, acting under this will, would be responsible. He would still be answerable for collusion if he handed over trust-money to his co-trustee, with reasonable ground for believing, or with a suspicion, that that trustee would commit a breach of trust; but no such case as this has been made by the bill."

Duties of  
trustees,—  
towards  
securing the  
trust property.

The two primary duties of a trustee are, first, to carry out the directions of the person creating the trust, and secondly, to place the trust property in a state of security.

Thus, if a trust-fund be an equitable interest, of which the legal estate cannot at present be transferred to an encumbrancer, it is the trustee's duty to lose no time in giving notice of his own interest to the person in whom the legal interest is vested; for, otherwise, he who created the trust might subsequently encumber adversely the interest he has settled, in favour of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority (e).

(1.) Reduction into possession or quasi-possession.

If the trust-fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in, and any unnecessary delay in this respect will be at his own personal risk (f).

An executor is not to allow the assets of the testator to remain outstanding upon *personal* security, though the debt was a loan by the testator himself on what he deemed an eligible investment (g). Where the trust-money cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust*, by the investment of it on some proper security. The trustee is not justifiable in lending on personal security, however good (h), unless expressly empowered to do so by the instrument creating the trust (i).

(2.) Realisation of moneys outstanding on personal security.

In the absence of any express power created by the settlement, and independently of any power which may be given by any statute for the time being in

(3.) Investment of trust-funds in the authorised securities.

(e) *Jacob v. Lucas*, 1 Beav. 436.

(f) *Grove v. Price*, 26 Beav. 103.

(g) *Paddon v. Richardson*, 7 De G. M. & G. 563; *Clough v. Bond*, 3 My. & Cr. 496.

(h) *Geaves v. Strahan*, 8 De G. M. & G. 291.

(i) *Paddon v. Richardson*, 7 De G. M. & G. 563.

force, trustees, executors, or administrators, should invest on mortgages of real estate in England, or in Government securities, or in Consolidated Bank Annuities (*j*).

Range of investments authorised by statute, for trust-moneys.

However, by Lord St. Leonards' Act, 22 and 23 Vict., c. 35, s. 32, trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, are authorised to invest trust-funds on real securities in any part of the United Kingdom, or in the stock of the Bank of England or Ireland, or in the East India Stock (*k*). Also, by Lord Cranworth's Act, 23 & 24 Vict., c. 145, s. 25, it is enacted that trustees, having trust-money in their hands which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same in any such securities as aforesaid, but no such change of investment as aforesaid shall be made (except in the Three per Cent. Consolidated Bank Annuities), where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent, in writing, of such person. Also, by statute 30 & 31 Vict., c. 132, s. 2, it is enacted (although somewhat unnecessarily) that, except where expressly forbidden by the instrument creating the trust, "it shall be lawful for every trustee, executor, or administrator, to invest any trust-fund in his possession

---

(*j*) *Baud v. Fardell*, 7 De G. M. & G. 628.

(*k*) See 23 & 24 Vict., c. 38, s. 12. General order under this Act, dated 1st Feb. 1861; 30 & 31 Vict., c. 132, s. 1, which extends the power of investment to East India Stocks created after the date of 22 & 23 Vict., c. 35. Lewin on Trusts, 252; *In re Wedderburn's Trusts*, 9 Ch. Div. 112.

or under his control in any securities, the interest of which shall be guaranteed by Parliament."

Lastly,—By the statute 34 & 35 Vict., c. 27 (The Debenture Stock Act, 1871), it is enacted that trustees, executors, and administrators, having power to invest trust-funds in the mortgages or bonds of any company, shall and may (unless the instrument of trust express to the contrary) invest such funds in the debenture-stock of any such company.

As a general rule, where a testator subjects the *residue* of his personal estate to a series of limitations directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, there, in the absence of indications of a contrary intention, such part of the residue as may be wearing out (such as leaseholds), must be converted, and put in such a state of investment as to be securely available for all persons interested in it. And if the residue comprises property of a reversionary nature, that also must be converted. The former of these two rules protects the remainder-man, the latter of them protects the tenant for life (l).

(4.) Conversion of terminable and reversionary property, comprised in residuary devise or bequest.

When trustees or executors were directed by the will to convert the testator's property, and invest it in Government or real securities, and neglected to do either, it was for a long time a question whether they should be answerable for the principal money with interest, or the amount of stock which might have been purchased at the period when the conversion should have been made, with subsequent dividends, at the option of the *cestui que trust*; or whether they

The limit or measure of trustee's liability for non-investment.

---

(l) 2 Sp. 42, 552, 557; *Bate v. Hooper*, 5 De G. M. & G. 338; *Howe v. Lord Dartmouth*, 7 Ves. 137; *Porter v. Baddeley*, L. R. 5 Ch. Div. 542; *Wright v. Lambert*, L. R. 6 Ch. Div. 649; and see *Macdonald v. Irvine*, 8 Ch. Div. 101; *Johnson v. Lawson*, W. N. 1879, 26.

should be charged with the amount of principal and interest only, without an option to the *cestui que trust* of taking the stock and dividends. It has now been decided that the trustee is answerable only for the *principal money and interest*, and that the *cestui que trust* has no option of taking the stock and dividends. The principle upon which the court proceeds is, that the trustee is liable only for not having done what it was his duty to have done, and the measure of his responsibility is that which the *cestui que trust* must have been entitled to in whatever mode that duty was performed (*m*).

Remedies of  
*cestui que*  
trust in event  
of a breach of  
trust.

It remains to expound the remedies of a *cestui que trust*, and in the first place to inquire into whose hands the estate may be followed.

(1.) Right of  
following the  
trust-estate.

If the alienee be a volunteer, then the estate may be followed into his hands whether he had notice of the trust or not (*n*), and if the alienee be a purchaser of the estate, even for valuable consideration, but with notice, the same rule applies (*o*). If, on the contrary, the alienee be a purchaser for valuable consideration, having the legal estate, and without notice, his title, even in equity, cannot be impeached, and he takes the land freed from the trust (*p*).

Purchaser  
with notice  
cannot protect  
himself by  
getting in the  
legal estate  
from an ex-  
press trustee.

If the purchaser has no notice of the trust up to and at the time of completing his purchase, but *afterwards* discovers the trust, and *then* obtains a voluntary conveyance from the trustee, he could not, even prior to the Vendor and Purchaser's Act, 1874 (*q*), protect himself

(*m*) *Robinson v. Robinson*, 1 De G. M. & G. 247.

(*n*) *Spurgeon v. Collier*, 1 Eden. 55.

(*o*) *Wigg v. Wigg*, 1 Atk. 382; *Kennedy v. Daly*, 1 Sch. & Lef. 345; *Daniels v. Davidson*, 16 Ves. 249.

(*p*) *Thorncliffe v. Hunt*, 3 De G. & Jo. 563; *Jones v. Powles*, 3 My. & K. 581; *Pilcher v. Rawlins*, L. R. 7 Ch. App. 259; overruling *Carter v. Carter*, 3 K. & J. 617.

(*q*) 37 & 38 Vict., c. 78.

by taking shelter under the legal estate, so obtained by subsequent voluntary conveyance; for that is not like getting in a first mortgage, which the first mortgagee upon being paid off has a right to transfer to whomsoever he will (*r*), and here notice of the trust converts the purchaser into a trustee, and he becomes a party to a breach of the trust (*s*). In consequence of the Vendor and Purchaser's Act, 1874, sect. 7, all protection or priority derivable from getting in the legal estate was abolished as from the 7th August 1874; that section was, however, repealed by the Land Transfer Act, 1875 (*t*), which came into operation on the 1st January 1876, and the repeal is expressed to be as from the date of the operation of the Act of 1874 (*i.e.*, 7th August 1874), except as to anything duly done under the last-mentioned Act before 1st January 1876. Consequently the old rule, assigning a priority and protection to the legal estate, is again restored; but that priority or protection does not extend (as above mentioned) to the case of a subsequent voluntary conveyance of the legal estate by the trustee thereof, in breach of his trust to an equitable mortgagee, who at the date of obtaining the legal estate has notice of the breach of trust; and Jessel, M. R., has stated it as his opinion, by way of *obiter dictum*, that even want of notice in such a case would make no difference (*u*).

The debt created by a breach of trust is regarded only as a simple contract debt, both at law and in equity, even where the trust arises under a deed executed by the trustees, unless the trustee who committed such breach of trust has acknowledged the debt under seal (*v*). But the mere acceptance by deed of the trust will not create a specialty, unless there be

Breach of  
trust creates  
a simple con-  
tract debt.

(*r*) *Bates v. Johnson*, Johns, 304.

(*s*) *Sharples v. Adams*, 32 Beav. 213; Lewin, 616.

(*t*) 38 & 39 Vict., c. 87.

(*u*) *Mumford v. Stohwasser*, L. R. 18 Eq. 556.

(*v*) 2 Sp. 936.

a covenant, express or implied, for payment of the trust fund (*w*). But since the Act (*x*) abolishing the priority of specialty creditors in the administration of estates of persons dying after the 1st day of January 1870, the distinction is become of little importance—after the decease of the trustee; and since the Judicature Act, 1873 (*y*), enacting that no claim of a *cestui que trust* against his trustee held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations, the distinction is deprived of all its importance,—during the life of the trustee and also after his death.

(*z*.) Right of following the property into which the trust-fund has been converted.

If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the substituted property can be traced (*z*).

When money, notes, &c., may be followed.

Money, notes, and bills may be followed by the rightful owner, where they have not been circulated or negotiated, or the person to whom they have passed had express notice of the trust (*a*), and the only difference between money on the one hand and notes and bills on the other, is that money is not earmarked, and therefore cannot, except under particular circumstances, be traced; but notes and bills, from carrying a number or a date, can in general be identified by the owner without difficulty (*b*). The difficulty of identification does not arise, where the trust property is still in the

---

(*w*) *Isaacson v. Harwood*, L. R. 3 Ch. App. 225; *Holland v. Holland*, L. R. 4 Ch. 449; and see *Butler v. Butler*, L. R. 5 Ch. Div. 554; and, on appeal, 7 Ch. Div. 116.

(*x*) 32 & 33 Vict., c. 46.

(*y*) 36 & 37 Vict., c. 66, sect. 25, sub-sect. 2, not affected by the Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57) § 10, except as regards trust terms to secure legacy or charge payable out of land.

(*z*) *Lewin*, 645; *Frith v. Cartland*, 2 Hem. & M. 417; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Hopper v. Conyers*, L. R. 2 Eq. 549.

(*a*) *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345.

(*b*) *Lewin*, 647; *Ford v. Hopkins*, 1 Salk. 283.



hands of the trustee; because in laying out trust-moneys, a trustee must be careful to keep his own property separate from the trust-fund; and if he mix them, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own (c).

It may be stated as a general rule, that if a trustee be guilty of any unreasonable delay in investing or transferring the fund, he will be answerable to the *cestui que trust* for interest during the period of his laches (d),—the rate being usually four per cent. but sometimes a higher rate.

Interest payable by trustees on a breach of trust.

It is not easy to define the circumstances under which the court will charge executors and trustees with more than four per cent., or with compound interest. The rules on this subject may be thus stated. The court will charge more than four per cent. upon balances in the hands of a trustee (e):—

When interest at more than four per cent. charged.

(1.) Where he ought to have received more, as where he had improperly called in a mortgage carrying five per cent.

(2.) Where he had actually received more than four per cent.

(3.) Where he must be presumed to have received more, as if he has traded with the money, in which case the *cestui que trust* has it at his option to take the profits actually obtained (f).

---

(c) *Lupton v. White*, 15 Ves. 432; *Mason v. Morley*, 34 Beav. 471, 475; see also *Hastie v. Hastie*, L. R. 2 Ch. Div. 304; *In re Hallett*, W.N., 1879, p. 146; and disting. *Fox v. Buckley*, L. R. 3 Ch. Div. 508.

(d) *Stafford v. Fiddon*, 23 Beav. 386.

(e) *Att.-Gen. v. Alford*, 4 De G. M. & G. 851; *Penny v. Avison*, 3 Jur. N.S. 62.

(f) *Jones v. Foxall*, 15 Beav. 392.

(4.) Where the trustee is guilty of direct breaches of trust, or gross misconduct (*g*).

**Acquiescence.** The remedy of a *cestui que trust* against his trustee for breach of trust of any sort may be barred by the concurrence of the *cestui que trust*, or by his acquiescence, or by his executing a release (*h*).

**Persons under disability.** Persons under disability, as married women (*i*), or infants (*j*), who have concurred in a breach of trust, may nevertheless proceed against the trustees; except where they have by their own fraud induced the trustees to deviate from the proper performance of their duties; and even in that excepted case, married women, at least, may occasionally proceed successfully against the trustee whom they have induced to deviate from his duties,—*e.g.*, where the trust is for the separate use of the married women without power of anticipation (*k*).

**Release and confirmation.** A *cestui que trust* may, by a release or confirmation, prevent himself from taking proceedings against trustees for a breach of trust (*l*), but neither will be binding on him unless he had a full knowledge of the facts of the case (*m*).

**Settlement of accounts.** A trustee is entitled to have his accounts examined and to have a settlement of them. If the *cestui que*

---

(*g*) *Mayor of Berwick v. Murray*, 7 De G. M. & G. 519; *Townend v. Townsend*, 1 Giff. 212.

(*h*) *Brice v. Stokes*, 2 L. C. 877; *Harden v. Parsons*, Eden, 145; *Burrows v. Walls*, 5 De G. M. & G. 233; *Farrant v. Blanchford*, 1 De G. Jo. & Sm. 107, 119.

(*i*) *Parkes v. White*, 11 Ves. 221.

(*j*) *Wilkinson v. Parry*, 4 Russ. 276.

(*k*) *Savage v. Foster*, 9 Mod. 35; *Wright v. Snowe*, 2 De G. & Sm. 321; *In re Lush's Trusts*, L. R. 4 Ch. App. 591; *Stanley v. Stanley*, 26 W. R. 310; 7 Ch. Div. 589.

(*l*) *French v. Hobson*, 9 Ves. 103.

(*m*) *Lloyd v. Attwood*, 3 De G. & Jo. 650; *Kay v. Smith*, 21 Beav. 522; *Burrows v. Walls*, 5 De G. M. & G. 254.

*trust* being *sui juris*, is satisfied that nothing more is due to him, he ought to close the account, and give an acknowledgment equivalent to a release. On the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to have the accounts taken. He is bound to adopt one of these two courses; he is not at liberty to keep a chancery suit hanging for an indefinite time over the head of the trustee (n).

Usually settled accounts are not opened (*i.e.*, taken over again throughout, or *in toto*); but in an action for an account, when the plea of settled accounts is put forward in defence, the practice of the court is, upon proof of one clear omission or insertion that is erroneous, to give liberty to the plaintiff to *surcharge* the omission and to falsify the *insertion*, together with all other erroneous omissions and insertions: and this liberty is commonly called "liberty to surcharge and falsify" (o).

---

(n) 2 Sp. 46, 47, 921.

(o) *Heighington v. Grant*, 1 Phil. 601; *Pit v. Cholmondeley*, 2 Ves. Sr. 565; *Coleman v. Mellersh*, 2 M. & G. 309, 314; *Drew v. Power*, 1 Sch. & Lef. 182; and *disting. Blagrove v. Routh*, 2 K. & J. 509, 522; and *Watson v. Rodwell*, 7 Ch. Div. 625; 11 Ch. Div. 150.

## CHAPTER VII.

## DONATIONES MORTIS CAUSÂ.

Essentials of  
(1.) Must be  
made in  
expectation of  
death.

It is essential to a valid *donatio mortis causâ* that it should be made "in such a state of illness or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event (a)."

(2.) On condi-  
tion to be  
absolute on  
donor's death.  
Revoked by  
recovery or  
resumption.

A *donatio mortis causâ* is always made on the condition, expressed or implied, that the gift shall be absolute only in case of the donor's death, and shall therefore be revocable during his life (b). And if the donor recover from his illness, or if he resume the possession of the gift, it will be defeated (c). In *Staniland v. Willot* (d), the plaintiff, being possessed of shares in a public company, transferred them when in a state of extreme illness, into the name of the defendant; the plaintiff having recovered, but having subsequently become a lunatic, a bill was filed in his name by his committee to have the defendant declared a trustee of the shares. It was held that the plaintiff having survived the sickness during which the transfer was made, the gift could not operate as a *donatio mortis causâ*; and it appearing that the defendant had received the gift on the distinct understanding that it was to be absolute only in the event of the plaintiff's death, the defendant was held a trustee of the shares for the plaintiff.

---

(a) *Edwards v. Jones*, 1 My. & Cr. 233; *Duffield v. Elwes*, 1 Bligh. N.S. 530.

(b) *Edwards v. Jones*, 1 My. & Cr. 233.

(c) *Ward v. Turner*, L. C. 983; *Bunn v. Markham*, 7 Taunt. 231.

(d) 3 Mac. & G. 664.

In addition to the two before-mentioned requisites, <sup>(3)</sup> Delivery there is a further and all-essential requisite, viz., delivery. For, if the intention be expressed in writing, but no delivery takes place, even though the document be signed by the donor, it will be ineffectual as a *donatio mortis causâ*, for in fact it is a legacy, and the writing will be held a testamentary document, and therefore, if not attested by two witnesses, as directed by the Wills Act (e), it will be void as a testamentary document (f). And although it might possibly be good as a declaration of trust (g), still that is not at all likely, at least in the general case; for what is clearly intended to operate in one way and fails to do so, is not, as a rule, construed by the court to operate in another way—in favour of a volunteer. And if the gift is made by parol, without delivery of the article, it will be equally ineffectual as a *donatio mortis causâ*, nor can it possibly operate in such a case, either as a gift *inter vivos*, or as a testamentary disposition (h).

*Donationes mortis causâ* are not void by the Wills Acts (i); they are not, in fact, testamentary dispositions at all.

If a donor intends to make a testamentary gift which turns out to be ineffectual, it will not be supported as a *donatio mortis causâ*. Thus in *Mitchell v. Smith* (j), A. put into the hands of B. certain promissory notes, saying, "I give you these notes." A., on being reminded that they wanted indorsement, indorsed them in the presence of a witness as follows:—"I bequeath, pay the within contents to B. or his order at my death."

Imperfect  
testamentary  
gift,—not  
supported as a  
*donatio mortis  
causâ*.

(e) 1 Vict. c. 26.

(f) *Rigden v. Vallier*, 2 Ves. Sr. 258; *Tapley v. Kent*, 1 Rob. 400.

(g) *Morgan v. Malleson*, L. R. 10 Eq. 475.

(h) *Tate v. Gilbert*, 2 Ves. Jr. 120.

(i) 1 Vict. c. 26; *Moore v. Darton*, 4 De G. & Sm. 519.

(j) 12 W. R. 941.

Turner, L. J., said, that the indorsement of a promissory note, in order to be effectual, must be such as to enable the indorsee to negotiate the note. It was clear, however, that B. was not intended to have the power of doing this during the testator's life. The language of the indorsement and the evidence showed that a testamentary disposition was intended; and as this was invalid, B. could not take.

Ineffectual  
gift *inter vivos*,  
not supported  
as a *donatio*  
*mortis causâ*.

So also if the donor intends to make a gift *inter vivos* which is ineffectual, it cannot be supported as a *donatio mortis causâ*. Thus, in *Edwards v. Jones* (k), the obligee of a bond, five days before her death, signed a memorandum, *not under seal*, which was indorsed upon the bond, and which purported to be an assignment of the bond without consideration, to a person to whom the bond was at the same time delivered. The circumstances of the transaction did not constitute, in the opinion of the court, a *donatio mortis causâ*. It was also held that the gift was incomplete, and as it was without consideration, the court could not give effect to it. "It is argued," said the learned judge, "that the bonds were delivered either by way of *donatio mortis causâ*, or as a gift *inter vivos*. Now, in order to be good as a *donatio mortis causâ*, the gift must have been made in contemplation of death, and intended to take effect only after the donor's death. If it appeared, however, from the circumstances of the transaction, that the donor really intended to make an immediate and irrevocable gift of the bonds, that would destroy the title of the party who claims them as a *donatio mortis causâ*."

"In the present case the transaction is in writing, and this is a strong circumstance against the presumption of its being a *donatio mortis causâ*. Here is an

---

(k) 1 My. & Cr. 226.

instrument purporting to be a regular assignment exactly in the same form as where the purpose is absolutely and at once to pass the whole interest in the subject-matter. A party making a *donatio mortis causâ* does not part with his whole interest, save only in a certain event; and it is of the essence of the gift that it shall not otherwise take effect. Such a gift leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an attempted actual assignment by which the donor transfers all her right, title, and interest to her niece.

“The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be, whether the mere handing over of the bond would constitute a good gift *inter vivos*. This is a purely voluntary gift, and cannot be made effectual without the interposition of the court. This court will not aid a volunteer to carry into effect an imperfect gift.”

If a personal chattel be actually given by the donor himself to the donee, or by some other person at the donor's request, into the hands of the donee, or to some other person as trustee or agent for the donee, a good delivery is constituted. In *Farquharson v. Cave* (l), it was held that a mere delivery to an agent, in the character of an agent for the donor, would amount to nothing; it must be a delivery to the donee, or to the donee's agent (m). Where the chattel itself has not been delivered, it would seem that the delivery of some effective means of obtaining it, would be sufficient, though not the delivery of a mere ineffective symbol (n).

What is a sufficient delivery.  
(a.) To donee or donee's agent.  
(b.) Delivery of effective means of obtaining the property.

(l) 2 Coll. Ch. Ca. 367.

(m) *Moore v. Darton*, 4 De G. & Sm. 517.

(n) *Ward v. Turner*, 1 L. C. 983; *Snellgrove v. Bailey*, 3 Atk. 214.

If the thing given as a *donatio mortis causâ* be not a chattel in possession, but a chose in action, delivery of some document essential to the recovery of the chose in action is sufficient. Thus in *Moore v. Darton* (o), where, on a loan, the borrower had given the lender a receipt in the following terms:—"Received of Miss D. £500, to bear interest at five per cent. per annum," it was held that a delivery of the receipt to an agent of the borrower by the creditor on her deathbed, stating that she wished the debt to be cancelled, was a good *donatio mortis causâ*.

Examples  
of imperfect  
delivery.  
(a.) Delivery  
to donor's  
agent.

In *Jones v. Selby* (p), the delivery of the key of a box was held to be a sufficient *donatio mortis causâ* of its contents. In *Trimmer v. Danby* (q), upon the death of a testator, ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement:—"The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was the testator's housekeeper, and the key of the box was given into her custody. It was held, that as there had been no actual transfer or delivery into the hands of H. D., the bonds still remained part of the testator's assets, the court being of opinion that the testator gave the key to H. D. in her character of housekeeper, and for the purpose of taking care of it for his benefit; the court at the same time assenting that the testator meant to give the bonds to H. D., and that the bonds were capable of being transferred by hand, but maintaining that in cases of this nature it must be proved that there has been an actual transfer of the property, and that everything has been done that is capable of being done to effect that transfer (r)—the mere intention to transfer not being efficacious in favour of a volunteer.

(o) 4 De G. & Sm. 519.

(q) 25 L. J. Ch. 424.

(p) Prec. in Ch. 300.

(r) *Powell v. Hellicar*, 26 Beav. 261.



Not only must possession be given to the donee, but the donor must part with all dominion over the gift. Thus, in *Hawkins v. Blewitt* (s), A., being in his last illness, ordered a box containing wearing apparel to be carried to the defendant's house to be delivered to the defendant, giving no further directions respecting it. On the next day, the defendant brought the key of the box to A., who desired it to be taken back, saying, he should want a pair of breeches out of it. *Held*, not to be a good *donatio mortis causâ*, and the learned judge said, "In the case of a *donatio mortis causâ*, possession must be immediately given; and also in parting with the possession, it is necessary that the donor should part with the dominion over it. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself." (b.) Delivery to donor's agent, coupled with retention of ownership.

In connection with the two last-mentioned cases, it should also be borne in mind, that the word "house-keeper" is often a euphemism for females that are not only volunteers, but immoral and greedy persons, and whom, therefore, the court is not well-disposed towards.

There cannot, it seems, be a good *donatio mortis causâ* of railway stock (t); nor of the donor's own cheque upon a banker (u), unless cashed in his lifetime or otherwise negotiated (v). There may be a good *donatio mortis causâ* of a bond (w). The delivery of the mortgage-deeds of a real estate will constitute a valid *donatio mortis causâ* (x). So also will the de- What may be given as *donationes mortis causâ*.

(s) 2 Esp. 663.

(t) *Moore v. Moore*, L. R. 18 Eq. 474.

(u) *Tate v. Hilbert*, 4 Bro. C. C. 286; *Boutts v. Ellis*, 4 De G. M. & G. 249; *Hewitt v. Kaye*, L. R. 6 Eq. 198.

(v) *Rolls v. Pearce*, L. R. 5 Ch. Div. 730.

(w) *Snellgrove v. Baily*, 3 Atk. 214; *Gardner v. Parker*, 3 Mad. 184.

(x) *Duffield v. Elwes*, 1 Bligh. N.S. 497.

livery of a promissory note, payable to order, though not indorsed (*y*).

How it differs from a legacy, and agrees with a gift *inter vivos*.

A good *donatio mortis causâ* partakes partly of the character of a gift *inter vivos*, and partly of that of a legacy. It differs from a legacy, and resembles a gift *inter vivos* in these respects,—1. It takes effect *sub modo* from the delivery in the lifetime of the donor, and therefore cannot be proved as a testamentary act. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. It differs from a gift *inter vivos*, and resembles a legacy in these respects,—1. It is revocable during the donor's lifetime (*z*). 2. It may be made even at law to the donor's wife (*a*). 3. It is liable to the debts of the donor on a deficiency of assets (*b*). 4. It is subject to legacy duty (*c*).

How it resembles a legacy and differs from a gift *inter vivos*.

---

(*y*) *Veal v. Veal*, 27 Beav. 303.

(*z*) *Smith v. Casen*, cited 1 P. W. 406; *Jones v. Selby*, Prec. Ch. 300.

(*a*) *Tate v. Leithead*, Kay, 658.

(*b*) *Smith v. Casen*, cited 1 P. W. 406.

(*c*) 8 & 9 Vict., c. 76; 1 Sp. 196.

## CHAPTER VIII.

## LEGACIES.

No suit will lie at the common law to recover legacies, unless the executor has assented thereto (*a*), or unless the action should be by a legatee against the executors and a debtor as co-defendants, where the executors refuse to sue the debtor (*b*). But in cases of specific legacies of goods, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof (*c*). It is not difficult to see the reason why it is inexpedient that courts of law should have jurisdiction over legacies. Courts of law cannot (or at all events until recently could not), whereas the courts of equity always could and can, impose such terms as justice may require, upon the parties recovering those legacies; so that, for instance, an action at law might be (or at all events until recently might have been) maintained by a husband, for a legacy given to his wife, without making any provision for her, or for her family; whereas, a court of equity would require such a provision to be made. And even the Court of Probate established by the Court of Probate Act, 1857 (*d*), although the successor of the ecclesiastical court, is by a proviso in section 23 of that Act (being the section which confers and defines the jurisdiction of the court) expressly excluded from entertaining suits for legacies or suits for the distribution of

Suits for legacies only in equity unless executor assents.

Reasons.

(*a*) *Deeks v. Strutt*, 5 T. R. 690.

(*b*) *Yeatman v. Yeatman*, 7 Ch. Div. 210; *Travis v. Milne*, 9 Hare 141.

(*c*) *Doe v. Gay*, 3 East, 120.

(*d*) 20 & 21 Vict., c. 77.

residues. And under the Judicature Act, 1875 (e), a plaintiff is not to assign his action to the Probate Division of the High Court of Justice unless he would have been entitled, independently of—*i.e.*, previously to—the Judicature Acts, to have commenced his action in the Court of Probate.

Equity jurisdiction,—  
When exclusive.

Where the bequest of a legacy involves the execution of a trust, express or implied, or the legacy is charged on land, or the other courts cannot take due care of the interests of all parties, courts of equity will exert an exclusive jurisdiction. And even where the executor has assented to the legacy, courts of equity will now exercise a concurrent jurisdiction with the other courts over legacies; because the executor is treated as a trustee for the benefit of the legatees, a universal ground for the interposition of equity (f), and also, because the aid of equity may be required to obtain discovery, account, or distribution of assets, or some other mode of relief which other courts are, or were, incompetent to afford.

When concurrent.

Division of legacies.

1. General.

Bequests, or legacies, may be classed under three heads,—general, specific, and demonstrative. A legacy is general, where it does not amount to a bequest of any particular thing as distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or £1000 stock, or a horse, not referring to any particular diamond ring, stock, or horse, these legacies will be general. The terms, “pecuniary legacies” and “general legacies,” are commonly used as synonymous, although “pecuniary legacy,” strictly speaking, means only “a legacy of money,” and may therefore be either “specific” or “general (g).”

(e) 38 & 39 Vict., c. 77, sect. 11, sub-sect. 3.

(f) *Hurst v. Beach*, 5 Madd. 360.

(g) 1 Rep. Leg., by White, 191 n.; *Hawthorn v. Shedden*, 3 Sm. & G. 293; *Fielding v. Preston*, 1 De G. & Jo. 438.

A legacy is specific, when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator gives B. "my diamond ring," "my black horse," "my £1000 stock," or "£1000 contained in a particular bag," or "owing to me by C.," in these and the like instances, the legacies are specific (*h*). 2. Specific.

A legacy is *demonstrative*, when "it is in its nature a general legacy, but there is a particular fund pointed out to satisfy it (*i*)."<sup>3. Demonstrative.</sup> Thus, if a testator bequeaths £1000 out of his Reduced Bank Three Per Cents., the legacy will not be specific, but demonstrative (*j*).

It is a matter of great practical importance to distinguish these three different species of legacies one from the other. The chief points of difference are these:—1. If, after payment of debts, there is a deficiency of assets for payment of all the legacies, a general legacy will be liable to abate, but a specific legacy will not. 2. On the other hand, if a specific bequest is made of a chattel or a fund, which fails by alienation during the testator's lifetime, or otherwise, the legatee will not be entitled to any compensation out of the general personal estate of the testator; because nothing but the specific thing is given to the legatee (*k*). 3. But with regard to a demonstrative legacy, it is so far of the nature of a specific legacy, that it will not abate with the general legacies, until the fund out of which it is payable is exhausted, and it is also so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the means Distinctions.

(*h*) *Stephenson v. Dowson*, 3 Beav. 342; *Manning v. Purcell*, 7 De G. M. & G. 55.

(*i*) *Ashburner v. Macquire*, 2 L. C. 236; *Robinson v. Geldard*, 3 Mac. & G. 735.

(*j*) *Sparrow v. Josselyn*, 16 Beav. 135.

(*k*) 1 Rep. Leg., by White, 191-2; Brown's Dict., title *Legacies*.

of paying it (*l*), that being only the primary fund for payment.

Construction  
of legacies.

In deciding on the validity and interpretation of purely personal legacies, courts of equity in general follow the rules of the civil law, as recognised and acted on in the ecclesiastical courts; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the common law, which endeavour in all cases to favour the heir (*m*). Accordingly, the courts favour the vesting of legacies if not charged on land, whereby they become transmissible to the personal representatives of the legatee should he die before the time of payment (*n*); but the courts have also persistently held, that a legacy payable out of land, although it is vested in one sense, yet sinks for the benefit of the inheritance in case the legatee dies before the period of payment (*o*), unless where that period is postponed for adventitious reasons (*p*). Again, legacies charged on land carry interest as from the date of the testator's death (*q*); on the other hand, general legacies, not so charged, carry interest as from one year after the testator's decease (*r*), but a general legacy given in satisfaction of a debt carries interest as from the death (*s*), as does also a general legacy to an infant child not otherwise provided for (*t*).

*Nota Bene*.—Specific legacies carry interest from

---

(*l*) *Rop. Leg.*, by White, 237; see generally, *Mullins v. Smith*, 1 *Drew & Sm.* 210; *Vickers v. Pound*, 6 H. L. Cas. 885.

(*m*) See *Hawkins on Construction of Wills*; *Brown's Law Dictionary*, title *Legacies*.

(*n*) *Harrison v. Foreman*, 5 *Ves.* 207.

(*o*) *Pawlett v. Pawlett*, 1 *Vern.* 321.

(*p*) *King v. Withers*, 3 *P. Williams*, 414.

(*q*) *Maxwell v. Wettenhall*, 2 *P. Williams* 26.

(*r*) *Child v. Elsworth*, 2 *De G. M. & G.*, 679.

(*s*) *Clark v. Sewell*, 3 *Atk.* 99.

(*t*) *Newman v. Bateson*, 3 *Sw.* 689.

the death (*u*); and demonstrative legacies, so long as their proper fund remains, carry interest like specific, and afterwards like general legacies (*v*). The rate of interest is 4 per cent. (*w*).

---

(*u*) *Barrington v. Tristram*, 6 Ves. 345.

(*v*) *Mullins v. Smith*, 1 Dr. & Sm. 210.

(*w*) *Wood v. Bryant*, 2 Atk. 523.

## CHAPTER IX.

## CONVERSION.

General rule. "NOTHING is better established than this principle,  
 Money into "that money directed to be employed in the purchase of  
 land. "land, and land directed to be sold and turned into  
 Land into "money, are to be considered as that species of property  
 money. "into which they are directed to be converted, and this  
 "in whatever manner the direction is given, whether by  
 "will, or by contract, or in marriage articles or marriage  
 "settlement, or otherwise; and whether the money is  
 "actually paid or only covenanted to be paid; and  
 "whether the land is actually conveyed, or only agreed to  
 "be conveyed, the owner of the fund, or the contracting  
 "parties, may make land money, or money land" (a).

Conversion. This notional conversion of land into money, or of  
 money into land, may arise in two ways; *firstly*,  
 By will or under wills; *secondly*, under deeds. It is proposed to  
 settlement. treat the subject under the following heads,—dis-  
 tinguishing between deeds and wills:—

1. What words are sufficient to produce conver-  
sion;
2. From what time conversion takes place;
3. The general effects of conversion; and
4. The results of a total or partial failure of the  
objects and purposes for which conversion has been  
directed.

---

(a) *Fletcher v. Ashburner*, 1 L. C. 898.



1. *What words are sufficient to produce conversion.*

What words are sufficient. The direction to convert must be imperative, whether (1.) Express;

The direction to convert either money into land, or land into money, must be imperative: for if the direction to convert be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. Thus, in *Curling v. May* (b), A. gave £500 to B. in trust, that B. should lay out the same upon a purchase of lands, or put the same out on good securities, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H., the daughter, died, without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the husband-administrator; for the wife not having signified any intention of a preference, the court would take the money as it was found: if the wife had signified any intention, that intention would have been observed, but it was not reasonable at that time to give either her heir, or her administrator, or the trustee the liberty to elect; for Lord Talbot said, it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention (c).

But although the conversion is apparently optional, as where trustees are directed to lay out personality, "either in the purchase of lands of inheritance, or at interest," or "in land or some other securities," as they shall think most fit and proper, yet if the limitations and trusts of the money directed to be laid out are only adapted to real estates, so as to denote the testator's intention that land shall be purchased, this circumstance will outweigh the presumed option, and the money will be considered land (d). And, of course,

Or (2.) Implied, e.g., where limitations are adapted only to land, or vice versa.

(b) Cited 3 Atk. 255.

(c) *Bourne v. Bourne*, 2 Hare, 35.

(d) *Earlom v. Saunders*, Amb. 241.

the like rule will apply to the converse case, *i.e.*, when the limitations are (although they seldom are) exclusively applicable to personal estate. In short, in any case where it is clear that a testator, whatever may be the language he has used, intended that a conversion should take place at all events, equity holding the doctrine that the intent rather than the form is to be considered, will direct that the property should be converted in accordance with the testator's wishes (*e*).

Time from which conversion takes place.

In wills from testator's death.

Deeds from execution and delivery.

## 2. *Time from which conversion takes place.*

Subject to the general principle that the terms of each particular instrument must guide in the construction and effect of that instrument (*f*), the rule is that in regard to wills, conversion takes place as from the death of the testator (*g*), and as to deeds or other instruments *inter vivos*, that it takes place as from the date of execution.

Time from which conversion takes place in a deed.—*Griffith v. Ricketts*.

As regards the time from which, in the absence of special circumstances, conversion takes place in the case of a deed, some observations of the court, in *Griffith v. Ricketts* (*h*), are important. There a settlor conveyed the equity of redemption of real estate to trustees for sale for the benefit of his creditors, and on trust, if there should be any surplus, to pay the same to him, his executors, administrators, &c., to and for his and their own absolute use and benefit. *Held*, that this was a conversion of the real estate into personalty, as between the real and personal representatives of the settlor, on the following reasoning:—"A deed differs from a will in this material respect; "the will speaks from the death, the deed from delivery.

(*e*) *Thornton v. Hawley*, 10 Ves. 129; *Grievson v. Kirsopp*, 2 Kee. 653; *Davies v. Goodhew*, 6 Sim. 585; *Burrell v. Baskerfield*, 11 Beav. 525.

(*f*) *Ward v. Arch*, 15 Sim. 389.

(*g*) *Beauclerk v. Mead*, 2 Atk. 167.

(*h*) 7 Hare, 311.

"If then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed converts the property in the lifetime of the author of the deed, whereas in the case of a will, the conversion does not take place until the death of the testator; and there is no principle on which the court, as between the real and personal representatives (between whom there is confessedly no equity), should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs."

This rule was further illustrated in the case of *Clarke v. Franklin* (i). There a settlement was executed of real estate, by deed (not enrolled), to the use of the settlor for life, with remainder (subject to a power of revocation never exercised) to the use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at the settlor's death, and to apply the residue to charitable purposes. Some of the persons named survived the settlor, so that the purposes for which conversion was directed did not fail altogether, but the deed was void so far as it directed the proceeds of land to be applied to charitable purposes; and the question was, whether, under the circumstances, the surplus belonged to the heir or to the next of kin of the settlor. Vice-Chancellor Wood following *Hewitt v. Wright* (j) held that notwithstanding the trust for sale was not to arise until after the settlor's death, the property was impressed with the character of person-

*Clarke v. Franklin*,—  
to same effect.

---

(i) 4 K. & J. 257.

(j) 1 Bro. C. C. 86.

alty immediately upon the execution of the deed, and that the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty, and were, of course, upon his death distributable accordingly.

Rule as to deeds inapplicable when conversion is not the object.

As in mortgages.

But although it is true as a general rule that in a deed conversion takes place from the date of its execution, caution is required in applying that rule to instruments, such as mortgage deeds, where the general intention of the author of the trust is neither to convert nor to alter the devolution of the property, but merely to raise money. Thus in *Wright v. Rose* (k), A. being seised in fee of a freehold estate, borrowed £300 from B. the defendant, and secured the repayment of it with interest, by executing a mortgage deed of the estate, with power of sale, and by the terms of the deed it was provided that the surplus moneys to arise from the sale, in case the same should take place, should be paid to A., his *executors or administrators*. A. died intestate, and without ever having been married. All the interest due on the mortgage-money had been duly paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, B. the mortgagee entered into possession, and afterwards sold the estate under the power of sale for a sum which greatly exceeded the mortgage money and interest. The question was whether the surplus of the purchase-moneys was real or personal estate. Sir J. Leach held that it was real estate on the following grounds:—  
“If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, and the plaintiffs (the next of kin of the mortgagor) would have been entitled. But the estate being unsold

---

(k) 2 Sim. & St. 323.

at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce (l).

Closely connected in appearance with the class of cases just referred to, though differing from them in important essentials, are those cases where the conversion depends on an option to purchase to be exercised at a future time. Thus in *Larves v. Bennett* (m), A. made a lease to B. for seven years, and on the lease was endorsed an agreement that if B. should within a limited time be minded to purchase the inheritance of the premises for £3000, A. would convey them to B. for that sum. B. assigned to C. the lease, and the benefit of this agreement. A. died, and by his will gave all his *real* estate generally to D. and all his *personal* estate to D. and E. Within the limited time, but after the death of A., B. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for £3000. *Held*, that the sum of £3000, when paid, was part of the *personal* estate, and that E. was entitled to one moiety of it as such. "It is very clear," observed the Master of the Rolls, "that if a man seised of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of B. whether it shall be real or personal. It seems to me to make no distinction at all. . . . When the party who has the power of electing has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal, at a future period." Until, however, in such a case the option to purchase is exer-

Conversion depending on a future option to purchase.

(a) Option created previously to will, —(1) General devise, *Larves v. Bennett*.

Rents until option is exercised go as realty.

(l) See *Bourne v. Bourne*, 2 Hare, 35.

(m) 1 Cox. 167; see *Edwards v. West*, 7 Ch. Div. 858; *Reynard v. Arnolds*, L. R. 10 Ch. App. 386.

cised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate (*n*).

2. Specific  
Devise,—  
*Drant v. Vause.*

A similar question sometimes arises, where a testator devises lands over which a third party has a right at his option to purchase, whether, when such option is exercised, the purchase-money is to be bound by the same limitations as the real estate for which it has been substituted, or whether it is to follow the destination of the personal property of the testator. Thus in the case of *Drant v. Vause* (*o*), under a lease for years, the lessees had an option to purchase the fee-simple of the demised lands. After the date of the lease, the lessor made his will, whereby he devised the lands, *specifically* describing them, to G. for life, with remainders over. After the testator's death, the lessees elected to purchase the fee-simple of the lands. *Held*, on the special terms of the will, that the purchase-money did not fall into the residue of the personal estate, but was subject to the same limitations as had been declared concerning the purchased lands, and therefore that G. took a life interest in the purchase-money (*p*). It must be observed that in the above case, after the testator had made the agreement, he *specifically* and *in express terms* devised the lands, on certain limitations, from which it might be inferred that he intended that, at all events, the land or its value, in case the option should be exercised, should go to certain persons. It will be seen, therefore, on principle that in a similar case of agreement first, and will afterwards, if the will do not *specifically* refer to the property so agreed to be sold, no such intention will be inferred, and when the option is exercised, the

(*n*) *Townley v. Bedwell*, 14 Ves. 591; *Ex parte Hardy*, 30 Beav. 206.

(*o*) 1 Y. & C. C. C. 580.

(*p*) *Emuss v. Smith*, 2 De G. & Sm. 722.

purchase-money will fall into the personalty. This point was decided in *Collingwood v. Row* (q),—and also substantially in the before stated case of *Lawes v. Bennett*.

In the case of *Weeding v. Weeding* (r) the testator <sup>(b.) Option created subsequently to will.</sup> *after* making a will devising a specific estate and bequeathing the residue of his personal estate to other persons, entered into a contract, giving an option of <sup>(r.) General devise.</sup> purchase over part of the specific real estate, which <sup>(2.) Specific devise,—Weeding v. Weeding.</sup> option was exercised after his death. *Held*, that the property was converted from the date of the exercise of the option, and went to the residuary legatees. V.-C. Wood made the following observations:—"The testator must be presumed to know the law. With this knowledge he makes a will devising real estate in one way, and giving his personal estate upon different trusts. After this, he makes a contract, the effect of which he knows will be to give a third person the power of saying, at a future time, whether a certain portion of what was then his real estate shall be realty or personalty. You cannot assume an intention that the property, in any event, is to be divided in the particular proportions as to value, which existed at the date of the will. I understand the principle on which the cases of *Drant v. Vause* and *Emuss v. Smith* were decided, to be this: when you find that in a will made *after* a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the *specific* property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is a sufficient indication of an intention to pass that property, to give to the devisee all the interest, whatever it may be, that the testator had in it.

---

(q) 5 W.<sup>r</sup>R. 484.

(r) 1 J. & H. 424.

"But the case is very different, when, after having given the property by will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away. Here the testator first gives the Kentish Town estate to certain devisees, and his personalty to other persons. After that, a part of the estate ceases to be Kentish Town estate, and becomes personalty. There is no republication of the will after the contract by which this change would, in a certain contingency, be brought about. The intention is, that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known when he had entered into the contract that what would ultimately be Kentish Town estate would depend on the option of the lessee; and the inference is, that he meant his property to go according to the state to which it would be reduced by the exercise of that option" (s).

Where the devise of real estate is general and not specific, the rule of *Weeding v. Weeding*, to the effect that there is a taking away or ademption of the property from the devisee, when the subsequently created option is subsequently exercised, would undoubtedly apply, and would *à fortiori* apply, a general devisee being always less favoured than a specific one.

Where purpose subsequently fails, property is re-converted.

There is also another class of cases where conversion may have been directed or agreed upon, yet from the course of *subsequent events* it may be a question whether such constructive conversion has not ceased, so as that the heir and next of kin are restored to their original rights. The principles which govern these

---

(s) *Goold v. Teague*, 7 W. R. 84; *Woods v. Hyde*, 10 W. R. 339; and see *Frewen v. Frewen*, L. R. 10 Ch. App. 610.



cases will be treated of hereafter in the chapter on reconversion.

### 3. *As to the effects of conversion.*

These have been generally stated to be, to make personal estate real, and real estate personal.

The effects of conversion.

(a.) Money directed to be turned into land descends to the heir (t), and land directed to be converted into money goes to the personal representatives (u).

(b.) Money belonging to a married woman directed to be converted into land is liable to the husband's curtesy, though under the same circumstances it was held, in deference rather to the custom of conveyancers than to principle, that the widow was not entitled to her dower out of the money of her husband directed to be laid out in land (v). This anomaly has been swept away by the Dower Act (w).

(c.) Again, before the Wills Act (x), an infant, under the age of 21, might make a will of personal estate; but he could not, during minority, dispose of personalty to be laid out in land (y).

### 4. *The results of a total or partial failure of the purposes for which conversion is directed.*

4. Results of total or partial failure.

*As to total failure.* The universal rule may be thus stated—that where a conversion is directed or agreed upon, whether by will or by settlement, or other instrument inter vivos, whether of money into land, or of land

(A.) Total failure—in deeds and in wills indifferently.

(t) *Scudamore v. Scudamore*, Prec. in Ch. 543.

(u) *Ashby v. Palmer*, 1 Mer. 296; *Elliot v. Fisher*, 12 Sim. 505.

(v) *Sweetapple v. Bindon*, 2 Vern. 536.

(w) 3 & 4 Will. IV. c. 105, s. 2.

(x) 1 Vict., c. 26.

(y) *Earlom v. Saunders*, Amb. 241.

The property  
results uncon-  
verted.

into money, if the objects and purposes for which that conversion was intended have totally failed *before the instrument directing the conversion comes into operation*, no conversion will take place, but the property so directed or agreed to be converted will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged. In the words of Wood, V.-C., in the case of *Clarke v. Franklin* (2), "So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed, for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been *at home* in his lifetime, the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate (a).

(B.) Partial  
failure.

Where the purposes for which conversion is directed have *partially failed* before the instrument directing the conversion has come into operation, the rules are somewhat complex, and it will be necessary to deal *seriatim* with the cases, regard being had to the nature of the instrument by which such conversion is directed.

I. Under wills.

I. Cases under wills:—

(a.) Of land into money.

(b.) Of money into land.

II. Under in-  
struments  
*inter vivos*.

II. Cases under settlements or other instruments  
*inter vivos*:—

(a.) Of land into money.

(b.) Of money into land.

---

(2) 4 K. & J. 257.

(a) *Ripley v. Waterwork*, 7 Ves. 435; *Smith v. Claxton*, 4 Mad. 492.

With reference to each of these four cases, three questions will arise—

Three questions.

1stly. To what extent is the trust for conversion still in force?

2dly. Who is to benefit by the lapse or failure,—the heir or the personal representative of the testator or settlor?

3dly. In what character will the benefit accruing to the testator's or settlor's real or personal representative be taken by such real or personal representative?

# I. Cases under wills.

## (a.) Of land into money.

I. Under wills.  
Land into money.

In *Ackroyd v. Smithson* (b), a testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising out of the sale, and the residue thereof he gave to certain legatees of a previous part of his will in the proportion of the legacies he had already given them. Two of the residuary legatees died during the testator's lifetime; their shares consequently lapsed. The next of kin claimed the lapsed shares as part of the personalty; and so far as they were constituted of personal estate, they were decreed to go to the next of kin of the testator; but so far as they were constituted of real estate, to his heir-at-law. It would, perhaps, be impossible to find a clearer exposition of the principles governing this class of cases than in the celebrated argument of Mr. Scott, afterwards Lord Eldon. "That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not enough that the testator did not intend that his heir should take; he must make a

*Ackroyd v. Smithson*,—the heir takes the undisposed of surplus, or surplus lands.

---

(b) 1 Bro. C. C. 503, 1 L. C. 949.

There must be a gift over to exclude the heir.

Undisposed-of proceeds result to the heir.

disposition in favour of another (c). If he has not actually disposed of all his real estate, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *à fortiori* in a case where he has expressed no intention, to the *hæres natus*. . . . As to the question of fact, whether he meant that in some event only, or that *in all events*, the produce of his real estate should be considered as personalty, we admit that in favour of his residuary legatees he meant to convert the whole into personalty, in case *all* his residuary legatees should eventually take the whole ; but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition, in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property which his residuary legatees were to take ; but as to such part of the property, as in the event, they have not taken, he has not determined upon its nature : he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or the other must take some part of it ; but to say he has made it all personal property, and that, therefore, the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, where the circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with

respect to residuary legatees, in order to prove that he intended the same in favour of his next of kin, is to reason from a case in which intention *is* expressed to prove a like intention in a case which supposes the absence of intention."

It has recently been decided in *Steed v. Preece* (d), Doctrine does not apply to a sale by the court. that the doctrine of *Ackroyd v. Smithson* does not extend to the case of a sale under an order of the court in favour of an heir-at-law who had consented to such sale. Lands had been sold to raise an infant's costs in a suit for partition, and it was held that the personal representative was entitled to the surplus as against the remainder-man. Jessel M. R. there said, that "in *Ackroyd v. Smithson* no such general principle as the following was decided—namely, that if a trustee or the court sell so much land, as it is judged will be required to raise a charge, and there is a surplus, there is an equity to reconvert that surplus in favour of the real representative. The true principle is this, that the moment a sale is *properly* made, conversion follows, and there is no equity to reconvert the surplus."

From the case of *Ackroyd v. Smithson*, the questions, Smith v. Claxton: The land to be sold results to the heir,—as personal estate, if that is its actual condition. as to what extent the conversion is still in force, and who benefits by the lapse, will find a complete answer; but the further question still remains, whether the land directed to be sold results to the heir as real or as personal property, a question that sometimes arises between the real and personal representatives of such heir. The doctrine on this subject is clearly laid down in the case of *Smith v. Claxton* (e), a case illustrative of the principles governing equity with reference to cases both of total and of partial failure. "A devisor may give to his devisee either land or the price

---

(d) 22 W. R. 432; *Foster v. Foster*, 1 Ch. Div. 588; *Mildmay v. Quicke*, 6 Ch. Div. 553; but see *Cooke v. Dealey*, 22 Beav. 196.

(e) 4 Mad. 492.

of land, at his pleasure, and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the devisor to give lands to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of the devisee's personal estate. Under every will when the question is whether the devisee, or the heir, failing the devisee, takes an interest in the land, as land or as money, the true inquiry is, whether the devisor has expressed a purpose that in the events

(a.) Where sale is necessary,—it results as money to the heir.

which have happened the land shall be converted into money. Where a devisor directs his land to be sold, and the produce to be divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A. and B. take their several interests as money and not as land. So if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor that there shall be a sale for the convenience of division, still applies; and the heir will take the share of A., as A. would have taken it, as money and not as land.

(b.) Where sale is unnecessary, and is not made, or so far as not made,—it results as land to the heir.

But suppose A. and B. both to die in the lifetime of the devisor, and the whole interest in the land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the quality of money to the interest of the heir. The obvious purpose of the devisor being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would therefore take the whole interest as land." From the course of this argument, and from the current of authorities, the rule would seem to be briefly this, that where it is *necessary* to sell the land for the purposes of the trust, and there is only a *partial* disposition of the produce of the sale, here the surplus belongs to

the heir as money and not as land, and will therefore go to his personal representative, even though the land may not have been sold during his lifetime, *provided that it be afterwards actually sold*, and the surplus ascertained (*f*).

(*b*.) Money directed to be laid out in land.

Money into  
land.

The principle on which *Ackroyd v. Smithson* was decided applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail; for the undisposed-of interest in the money will result for the benefit of the next of kin of the testator as personalty, and will not go to the heir-at-law (*g*). Lord Cottenham, while Master of the Rolls, in the case of *Cogan v. Stephens* (*h*), after examining all the authorities upon this subject, put an end to the anomaly which would otherwise have existed in the law of conversion, by deciding in favour of the claims of the next of kin. In *Cogan v. Stephens*, the testator ordered that £30,000 should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died during the life of his widow, without issue) in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the statute of mortmain, it was held that the next of kin and not the heir-at-law of the testator were entitled to the fund. "If a testator," said his Lordship, "devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal, or which altogether fail, the

*Cogan v.*  
*Stephens* :  
Undisposed-of  
money results  
to personal re-  
presentatives.

(*f*) *Wright v. Wright*, 16 Ves. 188; *Jessopp v. Watson*, 1 My. & K. 665; *Wall v. Colshead*, 2 De G. & Jo. 683.

(*g*) *Reynolds v. Godlee*, Johnson, 536, 582.

(*h*) 1 Beav. 482, n.

next of kin takes it as in the case of an intestacy, as undisposed of. If a testator devises land for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose which by law cannot, or in fact does not, take effect, and so much as is not required for the purposes of the will, and this is whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal or which partially fail, the next of kin has no such interest in the money as cannot be applied to the purposes of the will; but if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? . . . In deciding in favour of the next of kin, I am following the principle of *Ackroyd v. Smithson*, and maintaining that uniformity of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time."

*Reynolds v. Godlee*: Undisposed-of personalty results to personal representatives of testator as personalty.

So far the analogy between cases of conversion of land into money and of money into land is complete. Here, however, the analogy ceases, or rather apparently ceases, but in reality continues. As to the question—in what character the undisposed-of personalty to be converted into land comes into the hands of the personal representative of the testator, whether, in apparent analogy to the decision in *Smith v. Claxton*, he will take it as realty, or whether he will take it in its original character of personalty, the case of *Reynolds v. Godlee* (i) has decided that the latter is the true view—that personalty directed by will to be laid out in

---

(i) 1 Johnson, 536, 583.



land to be held in trusts, which do not exhaust the absolute interest, devolves, after the expiration of the specified trusts, upon the executors of the testator, as personalty for the next of kin, *that being of course its actual condition at the time of its devolution* (j). And this is in fact what the converse case of *Smith v. Claxton* decided, although it is commonly misunderstood on this precise point. "It is urged," said Wood, V.-C., "that the analogy of *Smith v. Claxton* must be applied completely, as to make this real estate in the hands of the next of kin. But there is a great difference between realty and personalty in this respect. It is not the next of kin at all, but the executors on whom personal property devolves, until the purposes of the will are satisfied. . . . The executor is in general the only person who can stand here to claim the personal estate, and whatever he gets in *quâ* executor, he must hold as personalty."

It was decided in *Jessopp v. Watson* (k), that the blending of the proceeds of the real with the personal estate, for an express purpose which fails, will not operate to convert the real into personal estate for a purpose not expressed; viz., to give it to the next of kin. This rule received a strong application in *Fitch v. Weber* (l). There the testatrix devised and bequeathed her real and personal estate in trust, as to the real estate for sale, as soon after her decease as could be, and declared that the trustees should stand possessed of the proceeds of the sale, as a fund of personal and not of real estate, *for which purpose such proceeds, or any part thereof, should not in any case lapse or result for the benefit of the heir-at-law*; and after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects, as she should by any

Blending of real and personal estate,—the principle of *Ackroyd v. Smithson* is not thereby excluded.

(j) *Curteis v. Wormald*, 10 Ch. Div. 172.

(k) 1 My. & K. 667.

(l) 6 Har3, 146.

codicil to her will direct or appoint. The testatrix made no codicil. It was held that the heir-at-law was entitled to the proceeds of the real estate undisposed of—that the mere intention to exclude the heir was of no avail, *unless there was a gift over on failure of the purposes, to some one else*—that the purpose for which the testatrix said she excluded the heir, was simply that the realty might be made a fund of personalty, which purpose would not *per se* be sufficient to disinherit the heir *except for the purposes of the will*.

Conversion for purposes of will, or out and out.

The several cases on the subject seem to depend on this question,—“Whether the testator meant to give the produce of the real estate the quality of personalty to *all intents*, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention that the realty shall be converted into personalty not only for the *purposes of the will*, but further, that the produce of the real estate shall be taken as personalty, *whether such purposes take effect or not*, so much of the real estate or produce thereof as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficiency of the will itself, or from subsequent lapse or other cause of failure) will result to the heir. But every conversion, however absolute in its terms, will be deemed a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons respectively on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin” (*m*).

---

(*m*) Mr. Cox's note to *Cruse v. Barley*, 3 P. Wms. 22; 1 Jarman on Wills, 530, 2d ed.; *Amphlett v. Parke*, 2 Russ. & My. 221; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Robinson v. Governors of London Hospital*, 10 Hare, 19; *Barrs v. Fawkes*, 13 W. R. 987.

II. Cases under settlements or other instruments <i>inter vivos</i> .	II. Cases under settlements.
--	------------------------------

(a.) Of land into money.

(b.) Of money into land.

In both these cases, one general rule is applicable. When, by an instrument, *inter vivos*, realty is directed to be converted into personalty (*n*), or personalty into realty (*o*), for certain specified purposes or objects, and a *part* of those purposes or objects fail, the property to that extent results to the settlor, and through him, if it is land, directed to be converted into money, it goes to his personal representatives (*p*), and if it is money directed to be converted into land, it goes to his heir (*q*); and its subsequent further devolution (if any) will, *semble*, depend upon its actual character at the time that further devolution arises.

It will be seen, therefore, that there is a material distinction as to the application of the doctrine of resulting trusts between those cases where conversion partially fails, when it is directed by will, and when it is directed by deed. In the case of conversion directed by will, if there has been any partial failure of the purposes for which the conversion has been directed, to that extent it will result to the testator's representatives, real or personal, who would have been entitled to take it had no conversion been directed, whereas in the case of conversion directed by deed or other instrument *inter vivos*, the rule is just the reverse (*r*).

The reason of this distinction, as has already been

---

(n) *Clarke v. Franklin*, 4 K. & J. 263.

(o) See *Pulteney v. Darlington*, 1 Bro. Ch. Ca. 223; *Lechmere v. Lechmere*, Ca. temp. Talb. 80.

(p) *Griffith v. Ricketts*, 7 Hare, 299.

(q) *Wheldale v. Partridge*, 8 Ves. 236.

(r) Brown's Dictionary—title *Conversion*.

pointed out, is, that whereas a will comes into operation from the death of the testator, a deed takes effect in the *settlor's* lifetime, from the moment of its delivery. A simple illustration will suffice to set the rules on this subject in the clearest light. Suppose a conveyance of real estate by deed upon trust to pay the rents and profits to the settlor during his life, and after his death to sell the same and divide the proceeds between A. and B. equally, if then living. Afterwards A. dies before the time when his share becomes due, *i.e.*, before the settlor's death. As to his moiety there is a failure. Who takes it? Clearly the settlor, who is still alive, and to whom it must therefore result; but in what form? Here steps in the principle, that a deed for the purpose of conversion operates from the moment of its delivery, even though the settlor has directed the sale to take place after his death. The deed, therefore, has converted the realty in the lifetime of the author of the deed. "Whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime or after his death, the grantor by executing a deed of this description says, in effect, '*From the time I put my hand to this deed, I limit so much of this property to myself as personal property*'" (s). The property results into the hands of the settlor, not as realty, but in that form into which he has directed it to be converted, *i.e.*, as personalty (t).

---

(s) *Clarke v. Franklin*, 4 K & J. 263.

(t) *Ibid.*

## CHAPTER X.

## RECONVERSION.

RECONVERSION may be defined as that notional or Reconversion. imaginary process by which a prior notional conversion is annulled and taken away, and the notionally converted is property restored in contemplation of a court of equity to its original actual unconverted quality. Thus real estate is devised on trust to sell and pay the proceeds to A. ; by virtue of the direction, A. becomes absolutely entitled from the moment of the testator's death to the property as personalty, whether an actual sale has taken place or not. But A. has a right to elect in what form he will take the property. He has a right to tell the trustees, "I prefer the land instead of the purchase-money of the land." And according to his election the property will vest in him, as land or as money.

The cases on this subject range themselves under Two varieties two heads. Reconversion may take place in either of of reconver- two ways—viz., either

- I. By the act of the parties ; or,
- II. By operation of law.

I. Reconversion by the act of the parties.

I. By the act  
of the parties.

(A.) Who may and who may not elect, so as to reconvert,—and to what extent ?

1. It is clear that an absolute owner in fee simple 1. By absolute in possession of property directed to be converted may owner. elect to take that property in whatever form he chooses,

—there being, in fact, no other person who has any voice in the matter. And the reason is this, that since “equity, like nature, will do nothing in vain,” if the person in whose favour the conversion is directed elects to have the property in its unconverted state, it will be vain for equity to compel the doing of that which may be undone the next moment. But as the presumption is, that what ought to be done will be done—that conversion will take place—the onus of proof will be on those who allege that the owner has reconverted the property (a).

2. By owner of an undivided share.

2. So far the law is clear when the person entitled either to the money to be laid out in land, or to the land to be sold for money, is the absolute and only fee-simple owner in possession. But what is the principle when the person entitled is entitled not to the whole subject-matter, but to an undivided share?

(a.) Of money to be turned into land,—the undivided owner may re-convert.

(a.) Of money into land. In *Seeley v. Jago* (b), A. devised £1000 to be laid out in the purchase of lands in fee for the benefit of A., B., and C., *equally to be divided*. A. dies leaving an infant heir, and B. and C., together with the infant heir, bring a bill for the £1000. The Lord Chancellor said, “The money being directed to be laid out in land for A., B., and C., *equally*, which makes them tenants in common, and B. and C., electing to have their two-thirds in money, let it be paid to them, for it is vain to lay out this money in land for B. and C., when the next moment they may turn it into money, and equity, like nature, will do nothing in vain.”

(b.) Of land to be converted into money,—

(b.) Land to be turned into money. In *Holloway v. Radcliffe* (c), A. B. was entitled to two-thirds of an

(a) *Sisson v. Giles*, 11 W. R. 971; *Benson v. Benson*, 1 P. Wms. 130.

(b) 1 P. Wms. 389.

(c) 23 Beav. 163.

estate directed to be converted into personalty. *Held*,<sup>the undivided owner may not reconvert.</sup> that it had not been reconverted into realty by acts of A. B., done independently of the person entitled to the remaining one-third. Here the principle is clear. The sale of an undivided share would presumably be less marketable, and produce a far less sum than would be receivable in respect of that share of the proceeds of sale of the entirety; and therefore neither of the two undivided owners has a right to compel the other to forego a sale of the whole property.

3. A remainder-man cannot elect so as to affect the interests of the owners of prior estates. Take, for instance, the simple case of a settlement of money to be laid out in land upon trust for a tenant for life, with remainder in fee to some third person. There is no principle either at law or in equity, by which the remainder-man in fee can, as against the tenant for life, elect to take the property as money. The tenant for life can insist on his rights under the settlement, and can compel the trustees of the settlement to lay out the money as directed by the settlement. But although, as against the tenant for life, the remainder-man has no right to say that the money to be laid out in land shall again become money—shall be reconverted—of course, there is nothing to prevent the remainder-man declaring, *as between his real and personal representatives*, who claim as volunteers under him, that a particular reversionary interest to which he is entitled, shall be money or shall be land (*d*).

3. By remainder-man,—to extent of his own interest only.

4. An infant cannot ordinarily reconvert (*e*); because, usually, the matter can wait till he comes of age. And if the matter won't wait, then the court

4. By infants.

(*d*) 2 Sp. 271; *Triquet v. Thornton*, 13 Ves. 345; *Gillies v. Longlands*, 4 De G. & Sm. 372, 379; *Cookson v. Cookson*, 12 Cl. & F. 121.

(*e*) *Seeley v. Jago*, 1 P. W. 389; *Carr v. Ellison*, 2 Bro. C. C. 56; *Dyer v. Dyer*, 13 W. R. 732; *Robinson v. Robinson*, 19 Beav. 494.

may direct an inquiry whether it is for the benefit of the infant to reconvert or not, and will order and decree according to the result of the inquiry,—but apparently without prejudice to the diverse rights of the real and personal representatives of the infant dying under age (*f*).

5. By lunatics. 5. A lunatic cannot reconvert (*g*), but his committee, with the sanction of the court, may do so for him, in which case the like inquiry will be directed as in the case of infants; only the court, *semble*, will not in the case of lunatics have any regard to, or make any saving of, the diverse rights of the real and personal representatives of the lunatic (*h*).

6. By married women. 6. The rules as to the capability of married women to reconvert demand a more particular consideration.

(*a.*) Money into land.

(*a.*) As to money to be converted into land.

(*aa.*) Anciently, the married woman was examined in court, and so reconverted.

A *feme covert* cannot elect by a contract or ordinary deed (*i*). But although, as observed by Lord Hardwicke in *Oldham v. Hughes* (*j*), “a *feme covert* cannot alter the nature of money to be laid out in land, *barely* by a contract or deed, for to alter the property of it, or course of descent, yet the money may be invested in land (and sometimes sham purchases have been made for that purpose), and she may then levy a fine of the land and give it to her husband, or anybody else. There is a way, also, of doing this without laying the money out in land, and that is by coming into this court, whereby the wife may consent to take this money as personal estate; and upon her being present in court, and being examined (as a *feme covert* on a

---

(*f*) See the chapter on *Infants*, *infra*; also *Foster v. Foster*, L. R. 1 Ch. Div. 588.

(*g*) *Ashby v. Palmer*, 1 Mer. 296.

(*h*) See the chapter on *Lunatics*, *infra*.

(*i*) *Frank v. Frank*, 3 My. & Cr. 171.

(*j*) 2 Atk. 453.



fine is) as to such consent, it binds this money articted to be laid out in land as much as a fine at law would the land, and she may then dispose of it to her husband, or anybody else; and the reason of it is, that at law money so articted to be laid out in land is considered barely as money till an actual investiture and the equity of this court alone views it in the light of a real estate; and, therefore, this court can act upon its own creature, and do what a fine at common law can upon land, and if the wife has craved aid of this court, in the manner I have mentioned, she might have changed the nature of this money which is realised; but she cannot do it by deed."

The necessity of making these sham purchases caused much inconvenience, which was attempted to be remedied by several statutes. Finally, by 3 & 4 Will. IV., c. 74, s. 77, a married woman was permitted by deed executed in compliance with its provisions to make her election to take or dispose of money to be laid out in land (*k*).

(*bb*.) At present, the married woman executes a deed acknowledged, and so reconverts. 3 & 4 Will. IV. c. 74, s. 77.

(*b*.) Land to be converted into money.

(*b*.) Land into money.

Here the husband and wife might, before the stat. 3 & 4 Will. IV., c. 74, so long as the land remained unsold, by levying a fine, bar all the wife's estates and interest in the money to arise from the sale of the land (*l*). Such was the state of the old law; and under the Act for the abolition of fines and recoveries, the result is the same. That Act in substance, says (*m*), that a married woman may, with her husband's concurrence, by deed acknowledged under the Act, dispose of lands, or of money subject to be invested in lands, and also, of "any interest in land, either at law or

(*aa*.) Anciently, the married woman reconverted by levying a fine.

(*bb*.) At present, the married woman reconverts by executing a deed acknowledged.

(*k*) *Forbes v. Adams*, 9 Sim. 462.

(*l*) Co. Litt. 121 a. n.; *May v. Roper*, 4 Sim. 360.

(*m*) Sec. 77.

equity, or any charge, lien, or encumbrance in, or upon, or affecting land, either at law or in equity." In *Briggs v. Chamberlain* (*n*), it was decided that where the personal estate consists of moneys to arise from the sale of lands, she might bind her interest by a deed acknowledged, the subject-matter of disposition being then an interest in land, and falling, therefore, within the words of the statute; and in *Tuer v. Turner* (*o*), it was similarly decided regarding a married woman's reversionary interest, or remainder, in like moneys.

How election  
is shown.

(B.) Mode in which election to take the property in its actual state may be made.

(a) By express  
direction.

Of course it is clear that an express declaration of intention on the part of the absolute owner of property not being under any disability, that it shall be deemed real or personal estate, is *per se* sufficient to bind those claiming under him, without any reference to the actual state or condition of the property at the time, though it has been doubted whether a declaration by parol would be sufficient (*p*).

(b.) By implied  
direction, from  
conduct.

But much greater difficulty arises where the owner does not express his intention so to reconvert; the question will then occur, what acts of the owner are sufficient to lead to an inference that he desired and intended to possess the property according to its actual state and condition.

(aa.) As to  
land into  
money,—

(a.) As to real estate directed to be converted into money, slight circumstances are sufficient to raise a presumption that the owner has elected to retain it as

(n) 11 Hare, 69.

(o) *Tuer v. Turner*, 20 Beav. 560.

(p) *Bradish v. Gee*, Amb. 229; but see *Chaloner v. Butcher*, cited 3 Atk. 685; *Pulteney v. Darlington*, 1 Bro. C. C. 237; *Wheldale v. Partridge*, 8 Ves. 236; 1 L. C. 932.

realty. Thus if a person keeps land unsold for a long time, a presumption will arise that he has elected to take it as land (*q*). So the circumstances of granting a lease, reserving rent to the party entitled, her heirs, and assigns, was strong evidence of an intention in the lessor to elect that it should continue as land (*r*). In *Davies v. Ashford* (*s*), by marriage settlement real estates were conveyed to trustees, on trust to sell, and hold the proceeds on trusts for the husband and wife, for their lives successively, remainder on trust for their children, remainder on trust for the survivor of husband and wife absolutely. There was no issue. The husband survived his wife, and after her death consulted his solicitor as to his rights under the settlement, and then got possession of the settlement and title-deeds, &c., and remained in possession of them until his death, and also of the estates. *Held*, that he had elected to take the estates as land. The V.-C. of England said, "It does not distinctly appear in whose custody the title-deeds originally were, but it is clear that there was a change in the possession of them, and that Mr. Davies got them into his custody. Now, was not that of necessity a destruction of the trust? For the trustees could not have compelled Mr. Davies to deliver up the deeds; and without doing so they could not have made an effectual sale of the estate."

slight circumstances suffice to reconvert.

(*b*.) As regards personal estate to be laid out in land, of course, if the person absolutely entitled receives the money from the trustees, he is held to have elected to take it as money, and the trust is at an end (*t*). But it will not be so deemed

(*bb*.) As to money into land,—slight circumstances not sufficient to reconvert.

(*q*) *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Fremantle*, 17 Beav. 314; *Kirkman v. Miles*, 13 Ves. 338; *Mutlow v. Bigg*, L. R. 1 Ch. Div. 385; *In re Gordon, Roberts v. Gordon*, L. R. 6 Ch. Div. 531.

(*r*) *Crabtree v. Bramble*, 3 Atk. 680.

(*s*) 15 Sim. 42.

(*t*) *Trafford v. Boehm*, 3 Atk. 440; *Rook v. Worth*, 1 Ves. Sr. 461;

where he has received merely the *income*, though for a long time (*u*).

## II. By operation of law.

## II. Reconversion by operation of law.

Concurrence of two requisites to reconversion necessary,—  
1st, property in person entitled whether it be real or personal, and  
2d, no declaration by him concerning it.

If an instrument is to be taken to impress a fund with real qualities, the money being once clearly impressed with real uses, as land, in a contest between the heir and executor, the impression will remain for the benefit of the heir; and to put an end to that impression two things are necessary, neither of which standing alone will suffice, to reconvert the property, that is to say, firstly, it must be shown that the money was in the hands, *i.e.*, in the actual possession, of a person who had in himself both the executors and the heirs (*v*); and, secondly, that person must have died without making any declaration of his intention regarding it. If both these two things combine, then the property shall go according to the quality in which it was left by him at his death. And these two things being proved, the onus of proof to the contrary lies, of course, on those who deny reconversion, whereas in the case of reconversion by the act of the parties, it was pointed out that the onus lies on those who allege reconversion.

*Chichester v. Bickerstaff*—the money was “at home” for three days only, and Sir John “died and made no sign” about it.

In *Chichester v. Bickerstaff* (*w*), on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles by articles covenanted to pay £1500 in part of the portion, which, together with £1500 to be advanced by Sir John within three years after the marriage, was to be invested in land and settled on Sir John for life, remainder to his

---

*Cookson v. Cookson*, 12 Cl. & F. 147; *In re Davidson, Martin v. Trimmer*, 11 Ch. Div. 341.

(*u*) *Gillies v. Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*v*) *Wheldale v. Partridge*, 8 Ves. 235.

(*w*) 2 Vern. 295.

intended wife for life, remainder to their issue, remainder to Sir John's right heirs. Within a year of the marriage the wife died childless, and Sir John *three days after his wife*. Sir John by his will made Sir Charles his *executor*, and devised the residue of his personalty, after debts, &c., paid to Frances Chichester, his sister. The heir-at-law of Sir John filed a bill against Sir Charles to compel him to pay the £1500 which Sir John had covenanted to pay, insisting that by virtue of the marriage articles the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord Somers said, "This money, though once bound by the articles, yet, when the wife died without issue, became free again, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and the case is much stronger where there is a residuary legatee," and therefore dismissed the bill.

In the case of *Pulteney v. Darlington* (x), money *Pulteney v. Darlington*,— impressed with the qualities of realty had come by operation of law into the hands of the person (Lord Bath) solely entitled to it under the limitation in fee; the money was doubly reconverted, having been twice over "at home."

and the person so entitled, without taking notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in any wise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust-moneys (except certain *locally* described estates therein mentioned) to his brother H. in fee, and gave him all the residue of his personal estate, and made him his executor. His brother H. subsequently, by his will, gave all his estates by *local* descriptions to certain uses

---

(x) 1 Bro. C. C. 223.

Money im-  
pressed with  
real uses *at*  
*home* in the  
hands of the  
absolute  
owner de-  
scends as  
money.

But not if it  
be outstanding  
in hands of a  
third party.

therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will. Subsequently to H.'s death, a bill was brought by the heir-at-law of Lord Bath to have the money laid out in land, but was dismissed. "If," said Lord Thurlow, "A. B. has in his possession £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished;" and after citing and commenting upon the cases on the subject, his Lordship added, "The use I make of these cases, notwithstanding the dicta they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. . . . But whether this is clearly so or not, circumstances of demeanour in the person (even though slight) will be sufficient to decide it; a very little would do; receiving it from the trustees, there is no doubt, would be sufficient. *Lord Bath did receive it, he had it in his hands.*" This decision was affirmed in the House of Lords (y); and as Lord Eldon says, "went no further than this, that if the property was *at home*, in the possession of the person under whom the heir and executor claimed, the heir could not take it, but if it stood out in a third person he possibly might; and the question in that case was not upon the equity between the heir and executor, but whether the money was *at home* (z).

(y) 7 Bro. P. C. Toml. Ed. 530.

(z) *Wheldale v. Partridge*, 8 Ves. 235. And see *Walrond v. Rosslyn*, *Walrond v. Fulford*, 11 Ch. Div. 640.

## CHAPTER XI.

## ELECTION.

THE doctrine of election in equity originates in two inconsistent alternative donations or benefits, the one of which the pretending donor has no power to make, without at least the assent of the donee of the other benefit. In this duality of gifts, or pretended gifts, there is an intention, which may be express but which is more often implied, that the one gift shall be a substitute for the other, and shall take effect only if the donee thereof permits the other gift to also take effect, substantially in the manner and to the extent intended by the donor. The permitting donee has the right to choose; whence this head of equity is commonly called election.

Election arises from inconsistent alternative gifts.

If the individual, to whom, by an instrument of donation, a benefit is offered, possesses a previous claim on the author of the instrument, and an intention appears that he shall not receive the benefit and also enforce his claim, the like principle of executing the purpose of the donor, requires the donee to elect between his original right and the substituted benefit; the gift being designed as a satisfaction of the claim, he cannot accept the former without renouncing the latter (*a*). But the commonest application of the doctrine is where the owner of an estate, having, in an instrument of donation, applied to the property of another, expressions which, were that property his own, would amount

Illustrations of inconsistent alternative gifts or quasi-gifts.

---

(*a*) See *post* on the Doctrine of Satisfaction.

to an effectual disposition of it to a third person, has also by the same instrument disposed of a portion of his (the donor's) own estate in favour of the proprietor whose rights he assumes to interfere with. In such a case the donor is understood to impose on the proprietor in question,—either the obligation of relinquishing the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights (to the extent at least of the fair market value of the proprietary interests which he so asserts); or, if he accepts that benefit, then the obligation of completing the donor's intended disposition by the conveyance, in conformity to it, of that portion of his property which it purports to affect.

The *foundation* and the *characteristic effect* of the equitable doctrine.

The *foundation* of the doctrine is the intention of the author of the instrument; an intention which, extending to the whole disposition, is frustrated by the failure of any part; and its *characteristic*, in its application to these cases, is, that, by an equitable arrangement, effect is given to a donation of that which is not the property of the donor; a valid gift in terms absolute, being qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition; whether express or implied, and although destitute of legal validity, annexed to the benefit proposed to him. To accept the benefit while he declines the burden is to frustrate the intention of the donor (*b*). To illustrate this application of the doctrine of election, suppose A. by *will* or *deed* gives to B. property belonging to C., and by the *same* instrument gives other property belonging to himself to C., a court of equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition of his conforming with all the pro-

---

(*b*) Note to *Dillon v. Parker*, 1 Sw. 395.



visions of the instrument, by renouncing the right to his own property in favour of B.; he must consequently make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument.

The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law, or at all events to be not without its analogy in that law. For, in Roman law, a bequest of property which the testator knew to belong to another was not void; but a bequest on the erroneous supposition that the subject belonged to the testator, was, it seems, invalid (*c*). In the latter respect, the Roman law is different from the English law, for by the English law (which dislikes those fruitless and impossible inquiries with which the civil law abounded), whether the donor knew or not that the property he assumed to deal with was his own or not, if he has advisedly assumed to give it, then and in either case it is held that the donee is put to his election (*d*).

Election,—  
derived from  
the civil law.

In the case already put, of A. giving to B. property belonging to C., and by the same instrument giving to C. other property belonging to A. himself, C. has two courses open to him to choose or to elect between,—

Two courses  
open to elect  
between,—

Either, 1stly, He may elect to take under the instrument, and consequently to conform to all its provisions. Here no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A.

(1.) Election  
under instru-  
ment.

Or, 2dly, He may elect against the instrument, in which case the question arises,—Does C., by refusing

(2.) Election  
against the  
instrument.

(c) See Just.'s Insts. ii. 24, 1.

(d) *Whistler v. Webster*, 2 Ves. Jr. 370.

to conform to the terms of the instrument, wholly forfeit his claim to the benefit intended to be conferred on him by that instrument, or does he forfeit only so much of that benefit under the instrument, as is necessary to compensate B. for the disappointment he has suffered by C.'s election against the instrument?

Illustration,—  
showing that  
compensation  
and not for-  
feiture is the  
rule,—upon  
an election  
against the  
instrument.

To illustrate, by a simple case. Suppose A., the testator, gives to B. a family estate belonging to C., worth £20,000 in the market, and by the same will gives to C. a legacy of £30,000 of his (A.'s) own property. C. is unwilling to part with his family estate, and therefore elects against the instrument. It has been held, that, in such a case, viz., the election against the instrument, the principle of compensation, and not that of forfeiture, is to govern. In the case put, therefore, C. will retain his family estate and will also receive £10,000 portion of his legacy of £30,000, leaving to B. £20,000 other portion of the legacy of £30,000 to compensate him for the value of the estate of which he has been disappointed by C.'s election against the instrument. The conclusion from all the cases is summed up by Mr. Swanston in his note to *Gretton v. Haward* (e) as follows:—

1st, That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefits intended for the refractory donee, in order to secure *compensation* to those whom his election disappoints.

2nd, That the surplus, after compensation, does not devolve, as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

---

(e) 1 Swanst. 433; see also *Rogers v. Jones*, L. R. 3 Ch. Div. 688; *Pickersgill v. Rodger*, L. R. 5 Ch. Div. 163.

It may be useful to warn the student carefully to discriminate this class of cases where a person disposes of that which is *not his own*, and confers on the real owner of that property some other benefits, from another apparently similar but in reality dissimilar class of cases, where a testator makes two or more separate devises or bequests of *his own* property in the same instrument. In this latter case, the gifts, whether beneficial or onerous, being both of them the property of the donor, the donee may take what is beneficial and reject what is onerous, unless it appear on the will that it was the intention of the testator to make the acceptance of the burden a condition of the benefit (*f*); but this class of cases does not fall properly within the equitable doctrine of election, and the student should accordingly wholly dismiss it from his mind.

No election proper, in cases where the testator makes two bequests of his own property in the same instrument.

As the doctrine of election depends on the principle of compensation, it follows that that doctrine will not be applicable where there is no fund from which compensation can be made. Or, speaking more accurately and plainly, the doctrine of election only properly arises where the donor, or pretending donor, really puts into his gifts, or pretended gifts, or some or one of them, *some property that actually is his own*, at the same time that he affects to give away the property of others. This will come out clearly upon contrasting the two next following cases:—

There must be a fund from which compensation can be made, *i.e.*, some property of donor's own.

Firstly, in the case of *Bristow v. Warde* (*g*), decided in 1794, it appeared that a father had the power of appointing certain moneys or stock (£6000 South Sea stock) among his children, and that the appointment-funds in question were given to the children in default of appointment by the father; it also appeared that the father by his will appointed portion of the funds to his

*Bristow v. Warde*,—case of donor not adding any property of his own.

(*f*) *Warren v. Rudall*, 1 J. & H. 13.

(*g*) 2 Ves. Jr. 336. See also *In re Fowler's Trust*, 27 Beav. 362.

*Whistler v. Webster*,—  
case of donor  
adding some  
property of  
his own.

children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); and it also appeared that the father did not in or by his will give any property of his own to the children. The court held that the children might keep their appointed shares, and also take (as in default of appointment) the shares appointed to X., Y., and Z.; and that, in fact, the children were not bound to elect. "The doctrine of election," said the Lord Chancellor, "never can be applied; but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases, there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute." On the other hand, in the case of *Whistler v. Webster* (*h*), also decided in 1794, it appeared that a father had the power of appointing certain moneys (£3000) among his children, and that the appointment-funds in question were given to his children in default of appointment by the father; it also appeared that the father by his will appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); but it also appeared that the father in and by his will gave also certain property of his own to the children. The court held that the children were bound to elect, keeping (if they chose) their appointed shares and the other benefits given to them in the will, and in that case not interfering with the shares improperly appointed to X., Y., and Z.; or else taking (if they chose) the entire appointment-fund to them-

selves, and out of the other benefits given to them by the will compensating X., Y., and Z. for the value of the shares improperly imported.

Considerable difficulty often attaches to cases of election when complicated, as the two lastly before stated cases were, with special powers of appointment, and it becomes necessary therefore to consider with some particularity of detail the following group of election cases, that is to say,—

*Cases of election under the execution of powers.*

(a.) Where, under a special power, an express appointment is made to a stranger to the power, which is therefore void, and a benefit is conferred by the same instrument, upon a person entitled, in default of appointment, the latter will be put to his election. Thus, “where a man having a power to appoint to A. a fund which, in default of appointment, is given to B., exercises the power in favour of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C., according to the appointment.”

Election under powers.  
(1.) As to person entitled in default of appointment,—a true case of election.

It has been said that where the donee of a power by the same instrument appoints to a stranger, and confers benefits out of his own property upon an object of the power, the latter will be put to his election (i). But it is submitted that in such a case the person who is the object of the power (not being also the person entitled in default of appointment) cannot with propriety be said to be put to his election, and for the following reasons. In order to raise a case of election, two essential circumstances, as we have seen, must concur :—

(2.) As to person entitled under the power,—no case of election properly so called.

---

(i) *Blacket v. Lamb*, 14 Beav. 482 ; 1 L. C. 389.

1st, That property which belongs to one person (A.) must be given to another person by the testator.

2d, That the testator at the same time gives to A. property of his (the testator's) own.

In such a case of concurrence, and only in such a case, A. would be put to his election.

Suppose, then, that A. is the object of the power, B., the person entitled in default of appointment to A., and X. is the person in whose favour the appointment is actually made. The appointment in favour of X. is clearly a bad appointment, and therefore the property would pass to B. as in default of appointment, and if the testator has conferred any benefits on B., he (B.) will be put to his election. But no property which *belongs to* A. has been given to X.; for A. is but a volunteer as regards the donee of the power, and until the donee has exercised his power over the fund in favour of A., it is not A.'s property; therefore, it is clear that an essential element to raise election as against A., is wanting. None of A.'s property has been given to another. But if A. had combined in himself both the character of the object of the power, and the person entitled to the fund in default (*i.e.*, if in the case put, A. and B. were the same individual), he would, if he had received any benefits from the donee of the power, be put to his election, not as A., the object of the power, but as *the person* (B.) *entitled, in default of appointment (j).*

But the same  
thing in effect.

The student will, however, observe that in the case supposed of A. and B. being different persons, if A.

---

(j) *Whistler v. Webster*, 2 Ves. Jr. 367.

gets any portion of the appointment-fund by any appointment thereof to him, he will be simply thankful for it and say nothing about what is appointed to X.; and if in addition A. gets also some property of the testator's own, he will simply be more thankful (in fact, A. will be doubly thankful), and again will say nothing about what is appointed to X. And that is all the author means by saying that A. will not be put to his election.

(b.) It has been decided "that where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow (*e.g.*, being attempts to evade the rule against perpetuities) (*k*), the court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes;" *i.e.*, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election (*l*). *On the other hand*, if the attempted modifications are in themselves such as the law will in ordinary cases allow, and are also sufficiently clear and imperative, amounting in substance to the creation of a trust or to a direct gift, then the question of election would arise, and would have to be answered upon the principles already explained. In other words, to cite the words of the Master of the Rolls in *Blacket v. Lamb* (*m*), "The question resolves itself into this, whether these words (meaning the precatory words in which it was attempted to modify the interests appointed to the

*Blacket v. Lamb*,—absolute appointment, with directions modifying the appointment,—When such directions are invalid.

When such directions are valid, and raise a case of election.

(*k*) *Wollaston v. King*, L. R. 8 Eq. 165.

(*l*) *Woolridge v. Woolridge*, Johns. 63.

(*m*) 14 Beav. 482. And see the judgment of James, V.-C., in *Wollaston v. King*, L. R. 8 Eq. 165.

children) amount to a direct appointment in favour of the grandchildren. If they do amount to such an appointment, there is not, I think, any doubt but that a case of election is raised. But if, on the other hand, these precatory words are to be treated as anything short of an actual appointment, that is, if they do not form a portion of the appointment executed by the testator, in that case they must be treated as a condition or something extraneous to the appointment superadded to it; and if so, and if the superadded condition be inconsistent with the power, it is merely void, and no case of election will arise. I am of opinion, that if the words had been used by the testator with reference to a fund which was wholly within his own control, to deal with *as he might think fit*, these words would have created a trust, and that his children, taking the gifts under the will of the testator, would have taken them charged with the duty of disposing of them according to that will; or, in other words, that a trust would have been created by implication in favour of the objects mentioned in the words of the gift, the execution of which this court would have enforced."

It would seem, accordingly, that where there is a clause of forfeiture of the legacies on non-compliance with any such attempted modification of the appointed interests, a case of election would be raised (*n*), assuming that the other conditions requisite for raising a case of election are present.

**Ineffectual attempts to dispose of property by will, —examples of raising or not election, —**  
(*a.*) Infancy.

Questions of election have also arisen, where a testator has attempted to dispose of his property by an instrument ineffectual for that purpose.

(*a.*) Infancy.—No case of election will be raised

---

(*n*) *King v. King*, 15 Ir. Ch. R. 479; *Boughton v. Boughton*, 2 Ves. Sr. 12.



where there is a want of capacity to devise real estate by reason of infancy. Thus, under the old law, where an infant whose will was valid as to personalty, but invalid as to realty, gave a legacy to his heir-at-law, and devised real estate to another person, the heir-at-law would not have been obliged to elect between the legacy and the real estate, which descended to him in consequence of the invalidity of the devise: he might have taken both (*o*); that is to say, he might have kept the real estate coming to him by descent in spite of the will, and also have taken the personal estate coming to him under the will.

(*b.*) Coverture.—Nor will a case of election arise if (*b.*) Coverture. there is a want of capacity to make a will arising from coverture. Thus, where a *feme covert* made a valid appointment by will to her husband, under a power, and also bequeathed to another person personal estate, to which the power did not extend, the husband was not put to his election, but was held to be entitled to the benefit appointed to him under the power, and also to the property ineffectually bequeathed by his wife, to which he was entitled *jure mariti* (*p*). And the rule is the same where the will is valid at the time of execution, but afterwards becomes inoperative (*q*).

(*c.*) Previous to the Wills Act, 1 Vict., c. 26, where (*c.*) Wills before 1 Vict. c. 26. a testator, by a will *not properly attested* for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from the heir, and gave him a legacy, the question has arisen whether the heir-at-law was obliged to elect between the legacy and the freehold estate, which descended to him in consequence

---

(*o*) *Hearle v. Greenbank*, 3 Atk. 695, 1 Ves. Sr. 298; 1 Vict., c. 26, s. 7.

(*p*) *Rich v. Cockell*, 9 Ves. 369.

(*q*) *Blaklock v. Grindle*, L. R. 7 Eq. 215.

of the devise away from him being inoperative; it is clearly settled that he would not be obliged to elect (*r*) unless the legacy were given to him with an express condition that if he disputed, or did not comply with the whole of the will, he should forfeit all benefit under it (*s*). On the other hand, if the will was *properly attested* for the devise of freehold estates, and the testator attempted to thereby dispose of *after-purchased lands*, which previous to the Wills Act, 1 Vict., c. 26, he could not effectually do, then the heir taking any personal estate under the will was bound to elect between that personal estate and such after-purchased lands so ineffectually attempted to be disposed away from him (*t*).

Election with reference to dower,—  
(*a.*) At law,—express words.  
(*b.*) In equity,—express words or necessary implication.

Necessary implication from concurrence of gift to widow with gift of other lands inconsistent with her right of dower.

Where the Dower Act (3 & 4 Will. IV., c. 105) does not apply, that is, in the case of all widows married on or before the 1st January 1834, a widow may at law be put to her election by express words between her dower and a gift conferred on her (*u*). In equity she may be put to her election between dower and a gift conferred on her, by manifest (*i.e.*, necessary) implication, demonstrating the intention of the donor to exclude her from her legal right to dower; but this intention will not be implied unless the instrument contains provisions essentially inconsistent with the assertion of her right to dower. The question then arises, What is a gift essentially inconsistent with her assertion of that right? It has been long settled that a devise, by a testator to his widow, of *part* of the lands of which she is dowable, is not essentially inconsistent with her claim to dower out of the remainder (*v*). A devise of lands out of which the widow is dowable

(*r*) *Sheddon v. Goodrich*, 8 Ves. 481.

(*s*) *Boughton v. Boughton*, 2 Ves. Sr. 12.

(*t*) *Schroder v. Schroder*, Kay, 578; Sugden's Concise View, 127.

(*u*) *Nottley v. Palmer*, 2 Drew. 93.

(*v*) *Lawrence v. Lawrence*, 2 Vern. 365.

on *trust for sale*, is not essentially inconsistent with her claim to dower out of those lands, even though the interest of a part of the proceeds of the sale is given to her (*w*); nor will a mere gift of an annuity to the testator's widow, although charged on all the testator's property, be so essentially inconsistent with, as to exclude, her right to dower (*x*).

The provisions which have generally been held to be essentially inconsistent with the widow's right to dower, are those which prescribe to the devisees a certain mode of enjoyment, which necessitates their having the entirety of the property. Thus, in *Butcher v. Kemp* (*y*), where the testator, having devised a freehold farm, containing about 136 acres, to trustees and their heirs, during the minority of his daughter, directed them *to carry on the business of the farm, or let it on lease, during the daughter's minority*, and the testator devised other lands to his widow for her life, and also gave her specific and pecuniary legacies, it was held that the widow was put to her election. Sir John Leach, V.-C., said, "The testator's plain intention is that the trustees should, for the benefit of his daughter, have authority to continue his business in the *entire* farm which he himself occupied, consisting of about 136 acres, and this intention must be disappointed if the widow could have assigned to her a third part of this land" (*z*).

Example of a gift inconsistent with widow's right of dower.

*N.B.*—It is hardly necessary to mention, that dower under the recent Dower Act (when that Act applies) is of too fragile and defeasible a character to raise any questions about election.

---

(*w*) *Ellis v. Lewis*, 3 Hare, 310.

(*x*) *Holdich v. Holdich*, 2 Y. & C. C. 19.

(*y*) 5 Mad. 61.

(*z*) *Miall v. Brain*, 4 Mad. 119; *Birmingham v. Kirwan*, 2 Sch. & L. 444.

The intention of the testator is to be sought for.

And speaking generally, in all cases whatsoever, in order to raise a case of election, there must appear on the will or instrument itself, a clear intention on the part of the testator to dispose of that which is not his own, although (as we have seen) it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own; if the intention in either case appears clearly, his disposition will be sufficient to raise a case of election (a), there being present of course the other requisites as above defined. On the other hand, if the intention does not clearly appear on the face of the will, but the words appearing to show the intention are capable of being otherwise satisfied, then there will arise no case for election.

Where the testator has a limited interest, he is presumed to have given his own, and not to have attempted to give what was not his own.

Accordingly where the testator devises an estate in which he has a limited interest at law, the court will lean, as far as possible, to a construction which would make him deal only with that to which he is entitled, and not with that over which he has no disposing power, inasmuch as every testator must, *prima facie*, be taken to "have intended to dispose only of what he had power to dispose of; and, in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of" (b).

*Shuttleworth v. Greaves*,—a case of shares in a specified company.

Thus, in *Shuttleworth v. Greaves* (c), the wife of F. S. was the only child of A., who was entitled to certain shares in the Nottingham Canal, which upon A.'s death were transferred into the names of "F. S. and wife," the wife having been her father's administratrix. F. S. was afterwards, until his death, treated

---

(a) *Stephens v. Stephens*, 1 De G. & J. 62; *Welby v. Welby*, 2 V. & B. 199.

(b) *Wintour v. Clifton*, 8 De G. M. & G. 651.

(c) 4 My. & Cr. 35.

by the canal company as proprietor of the shares, and received the dividends upon them, and was elected to be and also acted as a member of a committee, which, by the Company's Act of Parliament, was required to consist of proprietors of two or more shares. F. S. by his will bequeathed what he called "all my shares in the Nottingham Canal Navigation," and all his personal estate to trustees, in trust for his wife for life, remainder over to his brothers and sisters absolutely. The testator had no such canal shares at all, unless those so transferred into the names of his wife and himself should be considered his. *Held*, that the words of the will amounted to a bequest of the particular shares before-mentioned, and that the widow was bound to elect.

On the other hand, in *Dummer v. Pitcher* (d), by the testator's will "he bequeathed the rents of his leasehold houses, and the interest of all his funded property or estate," upon trust for his wife, for life, and after her decease, on trust, to pay divers legacies of stock. The testator had, in fact, no funded property at the date of his will; but there was at that date funded property standing in the joint names of himself and his wife. After his death, the wife claimed, by survivorship, the funded property standing in the names of her husband and herself—it was contended that, as she took benefits under the will, she ought to be put to her election between those benefits and the funded property. It was held, however, that the widow ought not to be put to her election—that she took the stock by survivorship, and that the testator *not having expressed on the face of the will any intention to treat the stock in question as his own*, no question of election arose (e).

*Dummer v. Pitcher*,—a case of funded property generally.

---

(d) 2 My. & K. 262.

(e) See *Usticke v. Peters*, 4 K. & J. 437.

Evidence  
dehors the  
instrument,—  
not admissible  
to make out  
a case of  
election.

It is now clearly settled that parol evidence dehors the will, is not admissible for the purpose of showing that a testator, considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest. Thus, in *Clementson v. Gandy* (f), where parol evidence was tendered for the purpose of showing that the testatrix intended to pass, under a general bequest, certain property in which she had only a life interest, supposing it to be her own absolutely, so as to put a legatee who had an interest in the property to his election, Lord Langdale refused to admit the evidence. "I am of opinion," observed his Lordship, "that this evidence cannot be admitted. It is tendered for the purpose of showing that the testatrix bequeathed property as her own which did not belong to her, and that she intended to leave a considerable residue for charitable purposes, which, by reason of that mistake, turns out to be much less than she is alleged to have intended; and it is argued that this raises a case of election. *The intention to dispose must, in all cases, appear by the will alone.* In cases which require it, the court may look at external circumstances, and consequently receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood" (g).

Persons under  
disabilities.  
(1.) Married  
women,—  
they elect as

(a.) Married women.—Although the practice as to the mode of election by married women has been somewhat fluctuating, an inquiry having occasionally been

(f) 1 Keen, 309.

(g) *Stratton v. Best*, 1 Ves. Jr. 285; *Smith v. Lyne*, 2 Y. & C. C. C. 345; *Honywood v. Forsker*, 30 Beav. 14.

directed as to which interest was most beneficial for them, and they were then required to elect within a limited time after the result of the inquiry (*h*);—it is now considered a settled thing that a married woman can elect so as to affect her interest in real property at the least; and if she should desire to do so, she must signify her election by deed acknowledged (*i*). In one case where she had proposed to elect, but the deed was not acknowledged, it was stated by Wood, V.-C., that the court could order a conveyance according to the purport of the unacknowledged deed, upon the ground that the married woman should not avail herself of her own fraud (*j*),—a ground the proof of which is always difficult in itself, and the necessity of proving it would, of course, involve the parties in a tedious action. Unfortunately, in the case of personal estate, a deed acknowledged is not always available; and in that case, the married woman is unable to elect, otherwise than under the direction of the court upon an inquiry as to which of the two things is the more beneficial for her (*k*).

to land, by deed acknowledged; and as to money, by direction of court on inquiry.

(*b*.) Infants.—With reference to infants also, the practice is not quite uniform, being of course adapted to the necessities of the case. Thus, in *Streatfield v. Streatfield* (*l*), the period of election was deferred until the infant came of age; but in other cases there has been a reference to inquire what would be most beneficial to the infant (*m*), and the court has elected upon the result of the inquiry being certified.

(2.) Infants,—they wait till of age; or else elect by direction of court on inquiry.

(*h*) *Davis v. Page*, 9 Ves. 350; *Wilson v. Townshend*, 2 Ves. Jr. 693.

(*i*) 3 & 4 Will. IV., c. 74, s. 77.

(*j*) *Barrow v. Barrow*, 4 K. & J. 409; *Willoughby v. Middleton*, 2 J. & H. 344.

(*k*) *Cooper v. Cooper*, L. R. 7 H. L. 53; see *In re Robin's Estate*, W. N. 1879, 95.

(*l*) 1 L. C. 369.

(*m*) *Bigland v. Huddleston*, 3 Bro. C. C. 285 n.; *Ashburnham v. Ashburnham*, 13 Jur. 1111.

(3.) Lunatics,  
—they elect  
by direction  
of court on  
inquiry.

(c.) Lunatics.—With reference to lunatics, the practice is to refer it to chambers or to some official or agreed referee to certify or report (as occasionally in the case of infants) what would be most beneficial to the lunatic, and the court has elected upon the result of the inquiry being certified. *Seemle*, the court would not defer the matter until the lunacy was superseded, unless, perhaps, where a supersedeas was in immediate prospect, or was in progress.

Privileges of  
persons com-  
pelled to elect.

Persons compelled to elect are entitled previously to ascertain the relative value of their own property and that conferred upon them (*n*), and may file a bill to have all necessary accounts taken and inquiries made (*o*). An election made under a mistake of fact will not be binding, for in all cases of election, the court, while it enforces the rule of equity that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance or under a misapprehension of the value of the funds (*p*).

What is  
deemed an  
election.

Election may be either *express*, in which case no question can arise; or it may be *implied*. And in the latter case, considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question must be determined (like any other question of fact) upon the circumstances of each particular case, and not on any general principle of law. It would be necessary to inquire into the circumstances of the property against which the election is supposed to have been made, for if a party, not being called on to elect, continues in

(*n*) *Boynton v. Boynton*, 1 Bro. C. C. 445.

(*o*) *Buttrick v. Brodhurst*, 3 Bro. C. C. 88.

(*p*) *Wake v. Wake*, 3 Bro. C. C. 255; *Kidney v. Coussmaker*, 12 Ves.  
136.



the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take one and reject the other; and in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own, as, for instance, by mortgaging it (particularly if this be done with the concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property (*q*). Any acts to be binding upon a person must be done with the intention of electing (*r*).

It is difficult to lay down any rule as to what length of time, after acts done from which election is usually implied, will be binding on a party, and prevent him from setting up the plea of ignorance of his rights (*s*). But, on the other hand, it must be remembered that a person may by his conduct suffer specific enjoyment by others until it becomes inequitable to disturb the rights that have meanwhile arisen (*t*). Length of time raises presumption.

A person who does not elect within the time limited, when a time is limited, will be considered as having elected to take against the instrument putting him to his election (*u*), *Semble*.

(*q*) *Padbury v. Clark*, 2 Mac. & G. 298.

(*r*) *Stratford v. Powell*, 1 Ball. & B. 1; *Dillon v. Parker*, 1 Swanst. 380, 387.

(*s*) *Reynard v. Spence*, 4 Beav. 103; *Sopwith v. Maughan*, 30 Beav. 235.

(*t*) *Tibbits v. Tibbits*, 19 Ves. 663.

(*u*) Decree in *Streatfield v. Streatfield*, 1 Swanst. 447; but see *Fytche v. Fytche*, L. R. 7 Eq. 494.

## CHAPTER XII.

## PERFORMANCE.

Equity im-  
putes an inten-  
tion to fulfil  
an obligation.

THE doctrine of performance is based upon the maxim of equity, which imputes an intention to fulfil an obligation; in other words, that when a person covenants to do an act, and he does some other act that is capable of being applied towards a performance of his covenant, he shall be presumed to have had the intention of performing his covenant when he did the other act.

Under this subject two classes of cases occur.

I. Where there is a covenant to purchase and settle lands, and a purchase of lands is made, but is not expressed to be in pursuance of such covenant, and no settlement of the purchased lands is made.

II. Where there is a covenant to *leave* personalty, and the covenantor dies intestate, and thereby property comes in fact to the covenantee.

I. Covenant to  
purchase land  
and land is  
purchased.

I. The doctrine upon the first branch of this subject was fully discussed in the leading case of *Lechmere v. Earl of Carlisle* (a). There, Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, covenanted to lay out within one year after his marriage £6000, her portion, and £24,000 (amounting in the whole to £30,000) in the

---

(a) 3 Peere Wms. 211; Ca. t. Talb. 80.

purchase of *freehold lands in possession*, in the south part of Great Britain, with the consent of the Earl of Carlisle and the Lord Morpeth (the trustees), to be settled on Lord Lechmere for life, remainder for so much as would amount to £800 a year to Lady Lechmere, for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere, his heirs and assigns for ever; and Lord Lechmere also covenanted that until the £30,000 should be laid out in lands, interest should be paid to the persons entitled to the rents and profits of the lands when purchased. Lord Lechmere was seised of some lands in fee at the time of his marriage; and after his marriage he purchased some *estates in fee* of about £500 per annum, some estates *for lives*, and some *reversionary estates in fee* expectant on lives, and also *contracted* for the purchase of some estates *in fee in possession*; he then died intestate, without issue, and without having made any settlement of any estate. None of the aforesaid purchases or contracts were made by Lord Lechmere with the consent of the trustees. Upon a bill being filed by Mr. Lechmere, the heir-at-law of Lord Lechmere, for specific performance of the covenant, and to have the £30,000 laid out as therein agreed; it was held by Jekyll, M.R., that he was entitled to specific performance of such covenant, and that none of the land which was permitted to descend to the heir was to be taken as part performance of the covenant. However, on appeal, Talbot, L. C., reversed the decree of the Master of the Rolls as to the *freehold* lands purchased and contracted to be purchased *in fee simple in possession after* the covenant, though with but part of the £30,000, and left to descend; and these were declared to go in part performance of the covenant. His Lordship, after distinguishing and putting aside the question of *satisfaction* (b), which he said did not properly fall

---

(b) *Wilcocks v. Wilcocks*, 2 Vern. 558.

within the case, continued as follows :—" As to all the  
" estates purchased previously to the articles, there is no  
" colour to say they can be intended in performance of  
" the articles ; and as to the leaseholds for life, and the  
" reversion in fee expectant on the estates for life, it  
" cannot be taken they were purchased in pursuance of  
" the articles, because they could not answer the end of  
" them. But as to the other purchases (in fee simple  
" in possession), why may they not be intended as  
" bought with a view to make good the articles ? Lord  
" Lechmere was bound to lay out the money with the  
" liking of the trustees, but there was no obligation to  
" lay it out all at once, nor was it hardly possible to  
" meet with such a purchase as would exactly tally  
" with it. Parts of the land purchased are in fee  
" simple in possession, in the south part of Great  
" Britain, and near to the family estate. But it is  
" said they are not bought with the liking of the  
" trustees. The intention of naming trustees was to  
" prevent unreasonable purchases, and the want of this  
" circumstance, if the purchases are agreeable in other  
" respects, is no reason to hinder why they should not  
" be bought in performance of the articles. It is  
" objected that the articles say the land shall be con-  
" veyed immediately. It is not necessary that every  
" parcel should be conveyed as soon as bought, but  
" after the whole was purchased, for it never could be  
" intended that there should be several settlements  
" under the same articles. Where a man is under an  
" obligation to lay out £30,000 in lands, and he lays  
" out part as he can find purchases, which are attended  
" with all material circumstances, it is more natural to  
" suppose those purchases made with regard to the  
" covenant than without it. *When a man lies under*  
" *an obligation to do a thing, it is more natural to*  
" *ascribe it to the obligation he lies under than to a*  
" *voluntary act independent of the obligation.*"

From the exhaustive judgment above quoted, besides the principal point for which the case was cited, we may consider four other points in connection with this subject as well established:—

1. Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be considered as purchased in part performance of the covenant. Deductions from *Lechmere v. Carlisle (Earl)*.  
1. Performance may be good, *pro tanto*.
2. Where the covenant points to a *future* purchase of lands, it cannot be presumed that lands of which the covenantor was seised at the time of the covenant, descending to his heir, were intended to be taken in part performance of it. 2. Previously purchased lands do not count.
3. It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance (c). 3. Lands purchased, if unsuitable, do not count.
4. Although by the settlement the consent of the trustee is required, still the absence of that consent will not necessarily prevent the presumption of performance from arising, if the other circumstances of the purchase are favourable to such presumption; and so immaterial is the absence of the trustees' consent, that in the case of *Sowden v. Sowden (d)*, the doctrine of *Lechmere v. Earl of Carlisle* was extended to a case even where the covenant was to pay money to trustees, to be laid out by them in a purchase of land, and the covenantor himself purchased land, and took a conveyance to himself of the fee, and died intestate without having made a settlement. 4. Trustees' consent to purchase,—want of, is immaterial.

It is to be observed, that a covenant to purchase Covenant to

---

(c) *Pinnell v. Hallet*, Amb. 106.

(d) 1 Bro. C. C. 582.

purchase does  
not create a  
lien on lands  
purchased.

lands generally is a mere specialty debt, and will not create a specific lien on the lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his marriage articles; and, consequently, such a covenant will not affect a purchaser or mortgagee of the lands even with notice (e). But it might be otherwise if the covenant was to acquire and settle certain specified lands; and it would certainly be otherwise if the covenant was to settle specified lands already acquired by the covenantor (f).

Right of *cestui  
que trust* to  
follow trust  
fund,—disting-  
uished from  
performance.

It may be well to refer here briefly to a class of cases, occasionally referred to the head of performance, but distinguishable therefrom, and depending in fact upon the rule that the *cestui que trust* of a fund is entitled to follow that fund into any subject-matter into which it may have been wrongfully converted. In the case of *Trench v. Harrison* (g), the trustees of a marriage settlement being empowered by it to invest the trust-funds in freeholds or copyholds of inheritance, with the consent of the husband and wife, authorised the husband to purchase a certain estate, as an investment of part of the trust-funds; and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent. It was held, nevertheless, that as between the husband and the trustees, he must be considered to have purchased the estate for them. These cases of following trust-money into land have some resemblance to the

---

(e) *Deacon v. Smith*, 3 Atk. 323.

(f) *Mornington v. Keane*, 2 De G. & J. 292.

(g) 17 Sim. 111; and see *Taylor v. Plumer*, 3 Maul. & Selw. 562.

case of performance, properly so called ; but in essentials they differ materially. In the case of performance the husband is under an obligation to purchase the land, while in the cases of following trust-money, the husband is under no such obligation, and therefore all turns on the circumstance that the purchase was in fact made with trust-money, with regard to which it is a well-settled rule that the money may, in most cases, be followed into the land in which it is invested (*h*).

II. The second class of cases ranked under the head of performance is, where a husband covenants to leave his wife a gross sum of money, or part of his personalty, and he dies intestate, so that she becomes entitled to a portion of his personal property under the Statute of Distributions. The question sometimes arises, whether such distributive share is a performance of the covenant, or whether she can claim both the distributive share and the money due under the covenant. The solution of this question depends on the two following rules which the cases on the point suggest :—

I. When the death of the husband occurs at the time, or previous to the time, when the obligation ought, by the terms of the covenant, to be performed, her distributive share will be taken as a performance of the covenant, *pro tanto* or *in toto*, as that share is, on the one hand, less than, or, on the other hand, equal to, or greater than, the sum due under the covenant. (1.) When husband's death occurs at or before time when the obligation accrues, distributive share a performance.

Thus, in *Blandy v. Widmore* (*i*), A. covenanted, previously to his marriage, to leave his intended wife £620. *Blandy v. Widmore*,—a case of per-

---

(*h*) *Lench v. Lench*, 10 Ves. 511.

(*i*) 2 L. C. 391.

formance *in toto*, where an immediate intestacy.

*Goldsmid v. Goldsmid*,—the same, where a resulting intestacy.

The marriage took place, and the husband died intestate. The wife became entitled to a moiety amounting to more than £620 of her husband's personal property, under the Statute of Distributions. The Lord Chancellor held, that this was a performance of the covenant, on the following ground—that the covenant was to be taken as *not broken*, for the husband had *left* his widow £620 and upwards; that, therefore, she could not come in first as a creditor for the £620 under the covenant, and then for a moiety of the surplus under the statute. Similarly, in the case of *Goldsmid v. Goldsmid (j)*, it was decided, on the authority of *Blandy v. Widmore*, that where the trusts of a testator's *will* failed, and his property became divisible as in case of intestacy, the widow's distributive share under the statute was a performance of the covenant by the husband under the marriage articles, that his executors should, after his death, pay her a certain sum of money. In his judgment, Sir T. Plumer, M.R., makes the following observations:—"Lord Eldon, in *Garthshore v. Chalie (k)*, speaking of *Blandy v. Widmore*, and other cases, says, 'These cases are distinct authorities that where a husband covenants to leave or to pay at his death a sum of money to a person who, independent of that agreement, by the relation between them and the provision of the law attending upon it, will take a provision, the covenant is to be construed with reference to that.' Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive, and consequently when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage

(j) 1 Swanst. 211.

(k) 10 Ves. 1.



contract, she in fact obtains from the executor or administrator that sum, the court is bound to consider that as payment under the covenant. *These are not cases of an ordinary debt; during the life of the husband there is no breach of the covenant, no debt; the covenant is to pay after his death, and the inquiry is not whether the payment of the distributive share is satisfaction, but a question perfectly distinct, whether it is performance.*"

2. Where the decease of the husband occurs after the obligation of the covenant has already arisen, or in other words, after a breach of such covenant, the widow's distributive share is not a performance of the obligation.

(2.) Where husband's death occurs after obligation accrues, distributive share not a performance.

Thus in *Oliver v. Brickland* (1), the husband covenanted to pay a sum *within two years* after marriage, and if he died his executors should pay it. He lived *after the two years* and died intestate, leaving a larger sum than what he covenanted to pay, to devolve upon his widow as her distributive share. The Master of the Rolls held that she was entitled both to the money under the covenant and to her distributive share of the residue. Here it will be seen that *there was a breach of covenant* before the death, and that from the moment of such breach a *debt* accrued due to the covenantee; whereas in the first class of cases the obligation to pay did not arise until the time at which the distributive share devolved.

Finally, it must be observed, that whereas in satisfaction the presumption will not hold (at least, in the case of creditors) where the thing substituted is less beneficial either in amount, or certainty, or time of

Performance distinguished from satisfaction.

---

(1) Cited 1 Ves. Sr. 1; 3 Atk. 420.

enjoyment, or otherwise, than the thing contracted for ; in performance the thing done, even though less beneficial in amount, certainty, &c., than the thing contracted to be done, will, other circumstances concurring, be taken as performance *pro tanto* of the covenant (*m*).

---

(*m*) Cox's note to *Blandy v. Widmore*; 1 P. Wms. 323.

## CHAPTER XIII.

## SATISFACTION.

AN important distinction exists between satisfaction and performance. Satisfaction, it is true, like performance, supposes intention; nevertheless, in satisfaction, the thing done is something different from the thing covenanted to be done, and is, in fact, a *substitute* for the thing covenanted to be done; whereas in performance, the *identical* act which the party contracted to do is considered to have been done (*a*).

The cases on the doctrine of satisfaction may be divided into *four* classes.

- I. Satisfaction of debts by legacies.
- II. Satisfaction of legacies by subsequent legacies.
- III. Satisfaction of legacies by portions.
- IV. Satisfaction of portions by legacies.

## I. Satisfaction of debts by legacies.

I. Of debts by legacies.

The general rule is, "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt, so that he shall not have both the debt and the legacy" (*b*). And this presumption is founded upon the maxim,

---

(*a*) *Goldsmid v. Goldsmid*, 1 Swanst. 211.

(*b*) *Talbot v. Shrewsbury*, Prec. Ch. 394; 2 L. C. 352.

**Presumption not favoured.** *Debitor non presumitur donare.* But the presumption is not favoured by the court, and the court's leaning against the presumption has led it to lay hold of trifling circumstances in order to exclude the presumption altogether.

**Rules.** From the various cases on the subject may be collected the following rules:—

1. **Legacy imports bounty.** 1. Words ordinarily employed to grant a legacy, show an intention of favour rather than an intention to fulfil an obligation, *i.e.*, "a legacy imports a bounty."
2. **If legacy be equal to debt.** 2. If the debtor bequeaths exactly the same sum, *simpliciter*, as the debt, it will be taken as a satisfaction. *Debitor non presumitur donare (c).*
3. **If legacy be less than debt.** 3. If the legacy be less than the debt, it has never been held to go in satisfaction, even *pro tanto (d).*
4. **Legacy greater than debt.** 4. The legacy of a sum, *simpliciter*, greater than the debt will be taken as a satisfaction of the debt, and only imports bounty as to the excess of the legacy over the debt (*e*).
5. **Debt contracted after will.** 5. The presumption will not be raised where the debt of the testator was contracted subsequently to the making of the will; for the testator could have no intention of making any satisfaction for what was not at the time in existence (*f*).
6. **Circumstances rebutting the presumption.** 6. Equity will lay hold of slight circumstances to indicate an intention that the legacy shall not go as a satisfaction. A few cases will illustrate how strong

---

(c) *Haynes v. Mico*, 1 Bro. C. C. 130.

(d) *Eastwood v. Vinke*, 2 P. Wms. 617.

(e) *Talbot v. Shrewsbury*, 2 L. C. 352.

(f) *Cranmer's Case*, 2 Salk. 508.

the leaning in equity is against the presumption of satisfaction.

Where there is an express direction in the will for payment of *debts* AND *legacies*, the court will, it seems, infer that it was the intention of the testator that both the debt and the legacy should be paid to his creditor. Thus, in *Chancey's case* (g), A. being indebted for wages to a maid-servant who had lived with him a considerable time, give her a bond for £100, and in the consideration of the bond, it appeared to be for *wages*. Afterwards by his will, he gave her a legacy of £500, stating in his will that it was "*for her long and faithful service*;" and he directed *that all his debts AND legacies should be paid*. It was held, that the legacy was not a satisfaction of the debt due on the bond, and the maid-servant had both her debt and her legacy. The court said, that the testator, by the express words of his will, had devised "that all his debts *and* legacies should be paid;" and this £100 being then a *debt*, and the £500 being a *legacy*, it was as strong as if he had directed that both the bond and the legacy should be paid. But it is doubtful whether a direction to pay debts *alone* will be sufficient to rebut the presumption of satisfaction. In *Edmunds v. Lowe* (h), Wood, V.-C., held that a charge of debts standing alone was not sufficient; nevertheless, the weight of authority seems to be in favour of the proposition, that if not absolutely sufficient in itself to rebut the presumption, such a charge is at least a strong circumstance against the presumption of satisfaction (i).

Another ground for avoiding the presumption of the satisfaction of a debt by a legacy, arises where the time

Direction in will for payment of debts and legacies.

Direction to pay debts alone.

Time for payment of legacy differing from that of debt.

(g) 1 P. Wms. 408; 2 L. C. 353.

(h) 3 K. & J. 318, 321.

(i) *Rowe v. Rowe*, 2 De G. & Sm. 297, 298; *Russel v. Hankins*, 7 W. R. 314; *Cole v. Willard*, 25 Beav. 568; *Pinchin v. Simms*, 30 Beav. 119; *Glover v. Hartcup*, 34 Beav. 74.

fixed for the payment of the legacy is different from the time when payment of the debt is demandable. Thus, in *Clarke v. Sewell* (*j*), the testator gave a legacy of £10,000 to his mother, to be paid by the trustees *one month* after his decease. The mother was entitled to £2000 from the estate of her son, in consequence of his having succeeded to the stock-in-trade of his father, and payment of this £2000 was demandable immediately upon the death of the son. It was held that there was no satisfaction—that in order to be so deemed, the £10,000 legacy ought to have become payable immediately on the testator's death, at which time the debt due from the son to the mother became payable; whereas, the legacy was to be paid *one month after* the testator's death (*k*). On the other hand, in *Wathen v. Smith* (*l*), where the legacy was payable at an earlier date than the money due under the settlement, and was therefore to the greater advantage of the legatee-creditor, it was held that the presumption of satisfaction arose.

Contingent  
legacy.

Where the legacy is contingent or uncertain, it will not be held a satisfaction of a debt. Thus, in *Barret v. Beckford* (*m*), a testator being under an obligation to pay an annuity to A., by his will gave the *residue* of his property to his mother and A. for life. It was held that this legacy of a moiety of the residue to A. was not a satisfaction of the annuity to A.; that in order that the gift should be deemed a satisfaction, it was necessary that the subject-matter of the gift and the debt should be exactly of the same nature, and of equal certainty. From the case of *Devese v. Pontet* (*n*), it will be seen that a gift, by will, of a residue to a wife, will not be a satisfaction of a debt due to her, and that the rule of *Blandy v. Widmore* in cases of

(*j*) 3 Atk. 96.

(*l*) 4 Mad. 325.

(*k*) *Haynes v. Mico*, 1 Bro. Ch. Ca. 129.

(*m*) 1 Ves. Sr. 519.

(*n*) 1 Cox, 188.

intestacy is inapplicable to cases where there is an operative will (o).

The Roman Law used to hold, and English common sense agrees, that a payment may be *less* in any one of *four* ways, viz., *re*,—*i.e.*, in amount; *loco*,—*i.e.*, in convenience of place; *tempore*,—*i.e.*, in time; and *causâ*,—*i.e.*, in quality. The four modes of *less*.

If the like distinctions were familiar in English Law, all the foregoing cases of the court's leaning against satisfaction would be resolvable into one case, namely, a legacy of *less* than the debt.

II. Satisfaction of legacies by subsequent legacies. II. Satisfaction of legacies by subsequent legacies.  
Two classes of cases occur under this head, viz. :—

(a.) Where the legacies are by the same instrument.

(b.) Where the legacies are by different instruments.

(1.) Where legacies of quantity in the *same* instrument, whether a will or codicil, are given to the same person *simpliciter*, and are of *equal* amount, one only will be good, nor will small differences in the way in which the gifts are conferred afford internal evidence that the testator intended they should be cumulative. Thus, in *Greenwood v. Greenwood* (p), the testatrix gave "to her niece, Mary Cook, the wife of John Cook, £500," and afterwards in the same will, amongst many other legacies, "to her cousin, Mary Cook, £500 for her own use and disposal, notwithstanding her coverture." It was held that Mary Cook was entitled to one legacy only, of £500, and that the same was for her separate use. (1.) Under the same instrument.  
(a.) Equal legacies are substitutive.

---

(o) *Bartlett v. Gillard*, 3 Russ. 149.

(p) 1 Bro. C. C. 31 n.

(b.) Unequal legacies are cumulative.

Where, however, the legacies given by the *same* instrument are of *unequal* amount, they will be considered cumulative (q).

(2.) Under different instruments,—Legacies whether equal or unequal are cumulative.

Unless same motive expressed and same sum.

(2.) Where a testator by *different* testamentary instruments has given legacies of quantity *simpliciter* to the same person, the court, considering that he who has given more than once, must, *prima facie*, mean more than one gift, awards to the legatee all the legacies, and it is immaterial whether the subsequent legacy differs or not in any particulars from the prior one (r). But though the legacies are in different instruments, if they are not given *simpliciter*, but the motive of the gift is expressed, and in such instruments the *same motive* is expressed, and the *same sum* is given, the court considers these two coincidences as raising a presumption that the testator did not, by a subsequent instrument, mean another gift, but only a repetition of the former gift (s). But the court raises this presumption *only* where the double coincidence occurs, of the *same motive* and the *same sum*, in both instruments. For if in either instrument there be, on the one hand, *no motive*, or a *different* or *additional* motive expressed, and the *sum* be the *same* in both instruments (t), or, on the other hand, though the *same motive* be expressed in different instruments, yet the *sums* are different (u), the presumption will be in favour of cumulation rather than of substitution. Where, however, a second instrument expressly refers to the first, or where, by intrinsic evidence, the later instrument was a mere revision, ex-

(q) *Hookey v. Hatton*, 1 Bro. C. C. 390 n.; *Curry v. Pile*, 2 Bro. C. C. 225; *Yockney v. Hansard*, 3 Hare, 620.

(r) *Roch v. Callen*, 6 Hare, 531; *Russell v. Dickson*, 4 H. L. Cas. 293.

(s) *Benyon v. Benyon*, 17 Ves. 34.

(t) *Roch v. Callen*, 6 Hare, 531; *Ridges v. Morrison*, 1 Bro. C. C. 388.

(u) *Hurst v. Beach*, 5 Mad. 352; *Baby v. Miller*, 1 E. & A. 218.



planation, or copy of the former, it will so far be held substitutional (v).

As to the question, when extrinsic evidence is receivable in favour of or against the presumption, the authorities seem to lead to the following conclusions (w). Extrinsic evidence,—when admissible and when not.

(a.) That where the court itself raises the presumption against double legacies—where, for instance, two legacies of equal amount are given by one instrument, parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will, and is in fact in restoration of the plain effect of the instrument. Where the court raises the presumption,—evidence to confirm instrument admissible.

(b.) But where the court does not raise the presumption—where, for instance, legacies of equal amount are given *simpliciter* by different instruments—parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will, and is in destruction of the plain effect of the instrument. Parol evidence being therefore excluded in this case, the question becomes one solely of construction (x). Where the court does not raise the presumption,—no evidence to contradict instrument admissible.

III. The satisfaction or, as it is more correctly termed, the ademption (y) of a legacy by a portion; and, III. and IV. Satisfaction of legacy by portion, and vice versa.

IV. The satisfaction of a portion by a legacy.

(v) *Fraser v. Byng*, 1 Russ. & My. 90; *Coote v. Boyd*, 2 Bro. C. C. 521; *Currie v. Pye*, 17 Ves. 462; and see *Whyte v. Whyte*, L. R. 17 Eq. 50.

(w) 2 L. C. 335.

(x) *Hurst v. Beach*, 5 Mad. 351; *Hall v. Hill*, 1 Dr. & War. 94; *Lee v. Pain*, 4 Hare, 216.

(y) "When the will is made first, and the settlement afterwards, it is always treated as a case of what is called ademption—that is to say, the benefits given by the settlement are considered to be an ademption of the same benefits given to the same child by the will.

"With reference to cases . . . of a previous settlement and a

General rule.

"Where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion, and by a sort of artificial rule—in the application of which legitimate children have been very harshly treated—upon an artificial notion, and a sort of feeling called a leaning against double portions—if the father advances a portion on the marriage of that child the portion is presumed to be an ademption of the legacy *pro tanto*, or *in toto*, as the money advanced is respectively less than, or equal to, or greater than the sum expressed to be given as a legacy" (z).

The following observations apply generally as well to the ademption of a legacy by a portion, as to the satisfaction of a portion by a legacy:—

Rule does not apply as to legacies and portions to a stranger, including (for this purpose) an illegitimate child.

1. In the case of double provisions, the doctrine of satisfaction does not in general apply to legacies and portions to strangers, but only where the parental relation, or its equivalent, exists. If, therefore, a person give a legacy to a mere stranger, and then make a settlement on that stranger; or first agree to make a settlement on that stranger, and then bequeath a legacy to him; the stranger is entitled to claim under both instruments: and for the purpose of this doctrine it is settled that an illegitimate child is, in the eye of the law, a stranger; and that, unless other circumstances are found than the bare relation of parentage "by nature," the illegitimate child is at liberty to claim a double provision (a).

---

subsequent will . . . it is now quite settled that there is no difference between the two cases, beyond the verbal difference that the term satisfaction is used where the settlement has preceded the will, and the term ademption where the will has preceded the settlement. In substance there is no distinction between the principles applied to the two classes of cases."—*Coventry v. Chichester*, 2 H. & M. 159.

(z) *Pym v. Lockyer*, 5 My. & Cr. 29.

(a) *Ex parte Pye*, 18 Ves. 140.

But the general rule will apply, though the testator stands neither in the legal nor assumed relation of a parent to the legatee, if the legacy be given for a particular purpose, and the testator advances money for the same purpose (b). Unless the legacy and portion be for the same specific purpose.

The presumption against double portions has been characterised as a hard and artificial rule, but, on examination, it will appear to be founded on good sense and justice. In *Suisse v. Lowther* (c), Wigram, V.-C., makes the following remarks:—"The rule of presumption, as I before said, is against double portions as between parent and child; and the reason is this—a parent makes a certain provision for his children by will, if they attain 21, or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the court acts upon it, and gives effect to the presumption that a double provision was not intended. If, on the other hand, there is no such relation either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason *within the knowledge of the court* for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the court should assign any limit to that bounty, which is wholly arbitrary. The court, as between strangers, treats several gifts as *prima facie* cumulative. The consequence is,

(b) *Monck v. Monck*, 1 Ball. & B. 303; *Pankhurst v. Howell*, L. R. 6 Ch. 136.

(c) 2 Hare, 435.

as Lord Eldon observed, that a natural child, who is in law a stranger to the father, stands in a better situation than a legitimate child, for the advancement in the case of the natural child is not, *primâ facie*, an ademption." But this anomaly is an accidental consequence of the rule, and the reasons of the rule which are good in themselves cannot be affected by what is accidental.

The presumption applies where the donor has placed himself *in loco parentis* to the donee.

2. The next general proposition is, that although the doctrine of satisfaction does not, as a general rule, apply where the donee is a stranger, it may and does apply where the donor has placed himself "*in loco parentis*" towards the beneficiary.

What is putting one's self *in loco parentis*.

As to what constitutes the *quasi*-parental relation, which is signified by the words, "putting one's self *in loco parentis*," the case of *Powys v. Mansfield* (d) is in point. There the question arose whether Sir John Barrington, who had by his will given £10,000 to one of his nieces, and had afterwards settled £10,000 on the marriage of the same niece, stood "*in loco parentis*" to the niece, so as to give rise to the application of the doctrine of satisfaction. The niece was one of the daughters of Sir John's brother, Fitzwilliam, and the general relations subsisting between the uncle and his nieces were thus stated in the evidence: "That Sir Fitzwilliam, in compliance with the wishes of Sir John, resided near Sir John, in the Isle of Wight, and maintained a more expensive establishment than his (Sir Fitzwilliam's) income (which did not exceed £400 a year) would allow of; that Sir John and his brother lived on the most affectionate terms with each other; that for several years Sir John gave his brother £1000 a year; that he took the greatest interest in his nieces, behaved to them as a father, and always acted to them

---

(d) 6 Sim. 544; 3 My. & Cr. 359.

as the kindest of parents, not showing more partiality to one than to another; that he frequently gave them pocket money, and made them other presents, and occasionally advanced money to defray the expense of their clothing and education; that he allowed them to use his horses and carriages, and had them frequently to dine with him, and that one or other of them was almost always staying at his house; that he was consulted as to the appointment of their masters and governesses, and as to the marriages of such of them as were married; and that on the plaintiff's marriage, the terms of the settlement were negotiated between the plaintiff and Sir John, and their respective solicitors, without any interference on the part of Sir Fitzwilliam. Upon these facts, the Lord Chancellor Cottenham, reversing the decision of the Vice-Chancellor Grant, held that Sir John had placed himself "*in loco parentis*," making the following observations:—"The authorities leave in some obscurity the question as to what is to be considered as meant by the expression "*'in loco parentis.'*" Lord Eldon, however, in *Ex parte Pye*, has given to it a definition which I readily adopt. He says, it is a person meaning to put himself *in loco parentis*, in the situation, that is to say, of the person described as the lawful father of the child, "*with reference to the office and duty of such father to make provision for the child.*" The Vice-Chancellor says it must be a person who has so acted towards the child as that he has thereby imposed on himself a moral obligation to provide for it, and that the designation will not hold where the child has a father with whom it resides, and by whom it is maintained. This seems to infer that the *locus parentis* assumed by the stranger must have reference to the pecuniary wants of the child, and that Lord Eldon's definition is to be so understood, and I so far agree with it; but I think the other circumstances required are not necessary to work out the

The parent of the child may be alive.

"principle of the rule or to effectuate its object. The rule, both as applied to a father and to one *in loco parentis*, is founded upon the presumed intention. A father is supposed to intend to do what he is in duty bound to do—namely, to provide for his child according to his means. So, one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it, affords a strong inference in favour of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it; but neither inference is conclusive" (e).

(3.) Leaning  
against double  
portions.

3. Whereas in the case of satisfaction of a debt by a legacy, equity leans (as we have seen) most strongly against the presumption, the leaning of the court is all the other way in the case of satisfaction of portion by legacy or of legacy by portion. In this latter case the presumption of satisfaction will not be repelled, "by slight circumstances of difference between the advance and the portion," just as the like differences in the case of alleged satisfaction of debt by legacy would not repel, but would (as we have seen) confirm the contrary leaning of the court in that case against satisfaction. And even very material differences do not seem to count. Thus, in the case of *Lord Durham v. Wharton* (f) a father by will bequeathed £10,000 to trustees, one half to be paid at the end of three years, and the other half at the end of six years from his death, with interest in the meanwhile, and declared the

---

(e) *Cooper v. Cooper*, 21 W. R. 501.

(f) 3 Cl. & F. 146; but see *Tussaud v. Tussaud*, 9 Ch. Div. 363.

trusts to be for his daughter for life, and after her decease in trust for her children, as she should appoint by deed or will, and in default of appointment for all her children equally; and subsequently, on the marriage of the daughter, he agreed to give her £15,000, to be paid to the intended husband, he securing by his settlement pin money and a jointure for his wife, and portions for the younger children of the marriage. It was held that the £10,000 legacy was satisfied by the £15,000 portion. It is to be observed how strong this decision was. By the will, the daughter took a life interest; by the settlement, a jointure. By the will *all* the children of the daughter took; by the settlement, portions were provided only for the younger children of the particular marriage.

And the same principles will be applied not only where, as in the above case, the will precedes the settlement, but where the order of events is, first, a settlement, secondly, a will. This was decided in the case of *Thynne v. Glengall* (g). There a father having, upon the marriage of his daughter, agreed to give her a portion of £100,000 consols, made an actual transfer of one-third thereof to the *four trustees* of the marriage settlement, and gave them his bond for the transfer of the remainder in like stock upon his death; the stock to be held by them in trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards by his will gave to *two* of the trustees a moiety of the *residue* of his personal estate in trust for the daughter's separate use for life, remainder for *her* children generally as *she* should by deed or will appoint. And it was held that the

Same principles applicable when settlement comes before will.

---

(g) 2 H. L. Cas. 131; see also *Russell v. St. Aubyn*, L. R. 2 Ch. Div. 398; *Mayd v. Field*, L. R. 3 Ch. Div. 587; *Bethell v. Abraham*, L. R. 3 Ch. Div. 590, 591 n.

Not a question  
of satisfaction  
of a debt.

moiety of the residue given by the will was a satisfaction of the sum of stock not yet actually transferred, being the portion thereof secured by the bond, and this notwithstanding the differences of the trusts. With reference to this subject, the following remarks were made in the House of Lords:—"We must throw out of consideration all the cases in which questions have arisen as to legacies being or not being held to be in satisfaction of a debt; for, however similar the two cases may appear at first sight, the rules of equity, as applicable to each, are absolutely opposed the one to the other. Equity leans against legacies being taken in satisfaction of a debt, but leans in favour of a provision made by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child, *to the prejudice generally, as in the present case, of other children*. In the case of a debt, therefore, small circumstances of difference between the debt and legacy are held to negative any presumption of satisfaction; whereas, in the case of portions, small circumstances are disregarded. So in the case of a debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portions, it is held to be a satisfaction *pro tanto*. In the case of a debt, a gift of the whole or part of the residue cannot be a satisfaction, because it is said, the amount being uncertain, it may prove to be less than the debt. In considering whether this rule applies to portions, which is the only question in this case, the reason of the rule as applicable to debts must not be lost sight of, because as a portion may be satisfied *pro tanto* by a smaller legacy, the reason given for the rule as applicable to debts cannot apply to portions. And, on the contrary, as the residue must be supposed by the testator to have been of some value, it would appear on principle that it ought to be considered as a satisfaction either altogether, or *pro tanto*, according to the amount. For why should £1000,



given as a residue, not have the same effect upon a larger portion as £1000 given as a money legacy."

It will be seen that there is no objection in principle to the application of this doctrine where the will precedes the settlement, and the trusts are dissimilar; yet in the case where the settlement comes first, a difficulty necessarily arises. For, in this latter case, the persons entitled under the settlement are *quasi-purchasers*, and as such cannot be deprived against their will of their rights upon any presumed intention of the testator. At the utmost they can only be put to election whether to take under the will or under the settlement, and the presumption against double portions will be much more easily rebutted than where the will precedes the settlement. The distinction is thus stated by Lord Cranworth, in his judgment in *Chichester v. Coventry* (*h*),—"When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption." And, in fact, in the before-stated case of *Thynne v. Glengall*,—the settlement in that case having preceded the will,—an inquiry was directed whether it was for the benefit of the daughter and her children to take under the will or under the settlement, and she was to elect accordingly.

Where settlement comes first, persons taking under it are *quasi-purchasers*, with right to elect between the settlement and the will.

It is also to be observed that in *Thynne v. Glengall*, the question of satisfaction arose only regarding the

---

(*h*) L. R. 2 H. L. 87; but see *Bennett v. Houldsworth*, L. R. 6 Ch. Div. 671.

*untransferred* stock; and, in fact, the principle of satisfaction does not apply at all *as regards advances actually made* upon a settlement or other advancement previously to the will (*i*), a difference never to be lost sight of between the two cases of will first and settlement afterwards, and settlement first and will afterwards.

Sum given by second instrument, if less, satisfaction *pro tanto*.

It was for some time an unsettled point as to whether, if the sum given by a second instrument was smaller than that given by the first, the less sum operated as a total satisfaction of the larger. This question can of course be of practical value only where the will precedes the settlement; for where the order is reversed, and the settlement comes first, the rights of those taking under a positive contract such as a settlement is, cannot be affected or modified by subsequent voluntary gifts. It was for a long time considered that the settlement of a smaller portion effected a complete ademption of a larger legacy given by a previous will. But it was left to Lord Cottenham in the case of *Pym v. Lockyer* (*j*), to establish the true and logical rule that an advancement subsequent to a will, if less in amount than the sum given by the will, was to be considered a satisfaction *pro tanto* only.

Legacy to a child to whom father is indebted.

Where a parent gives a legacy to a child to whom he is already *indebted*, the case stands on the same footing as a legacy by any other person in satisfaction of a *debt*, not being a portion; hence a subsequent legacy will not, in the absence of intention, express or implied, be considered as a satisfaction of the debt, unless it be either equal to or greater than the debt, in amount, and unless the presumption of satisfaction be not repelled by any of those slight circumstances

---

(*i*) *Watson v. Watson*, 33 Beav. 574; *Re Peacock's Estate*, L. R. 14 Eq. 236; *Hatfield v. Minet*, 8 Ch. Div. 136.

(*j*) 5 My. & Cr. 29.

which will take a bequest of such amount to a stranger out of the general rule (*k*). And the same rules apply to a legacy to a wife to whom the husband is indebted (*l*). Or to a wife.

Where a parent, however, being indebted to his child, makes in his lifetime an advancement to the child upon marriage, or upon some other occasion, of a portion equal to or exceeding the debt, it will *prima facie* be considered a satisfaction; and it is immaterial whether the portion be given in consideration of natural love or affection, or whether in the case of a portion to a daughter, the husband be ignorant of the debt. Thus, in *Wood v. Briant* (*m*) a father administrator *durante minore ætate* of his daughter, who was executrix and residuary legatee of her grandmother's estate, agreed when she married with the plaintiff that she should have £800, which in the settlement was called her portion. Lord Hardwicke refused to decree an account of the grandmother's personal estate, as she had been dead twenty years; but directed that the father's representatives should account for his personal estate as to the £800 only, and interest at four per cent. from the marriage (*n*). Lord Hardwicke said, "There are very few cases where a father will not be presumed to have paid the debt he owes to his daughter, when in his lifetime, he gives her in marriage a greater sum than he owed her, for it is very unnatural to suppose that he would choose to leave himself a debtor to her, and subject to an account."

As to "extrinsic evidence."—The rule against double portions is a presumption of law, and like other pre-  
Extrinsic evidence,—question of its

(*k*) *Stocken v. Stocken*, 4 Sim. 152.

(*l*) *Fowler v. Fowler*, 3 P. Wms. 353; *Cole v. Willard*, 25 Beav. 568.

(*m*) 2 Atk. 521.

(*n*) *Hayes v. Garvey*, 2 J. & L. temp. Sugd. 268; *Plunkett v. Lewis*, 3 Hare, 316.

admissibility  
or non-  
admissibility.

(1.) To vary or  
contradict the  
plain effect of  
document,  
where there is  
no presumption  
of law contrary  
to that effect,—  
extrinsic evi-  
dence is not  
admissible,—  
*Hall v. Hill.*

sumptions of law may be 'rebutted by evidence of extrinsic circumstances, *i.e.*, evidence of facts not contained in the written instrument itself. The rules on this subject may be gathered from the cases of *Hall v. Hill* (o) and *Kirk v. Eddowes* (p). In *Hall v. Hill* the facts were as follows: the testator, on the marriage of his daughter, intended to provide a sum of £800 as her portion, and gave a bond for the sum to the husband, payable by instalments, part thereof to be paid during his life, and the residue upon his decease, and afterwards by his will bequeathed to his daughter a legacy of £800. Parol evidence was tendered on the part of the defendants to show what was the real intention of the testator. The question was,—whether the parol evidence was admissible. The Lord Chancellor said,—“There is no doubt of the general rule “that *when by presumption you come to a construction against the apparent intention of the instrument, that may be rebutted by parol evidence.* What am I to do “in the present case? Here the debt was first incurred, and then comes the will. The legacy to the “daughter by that will could not, by the general rules “of the court, be held to be a satisfaction of the debt. “The will gives a legacy simply. The law says that “this legacy is not in satisfaction of the previous debt. “I am asked now to insert in the will a declaration by “the testator which I do not find in it, namely, that he “means the legacy to be a satisfaction of the debt. “I am of opinion I can do no such thing.”

2.) To confirm  
the plain effect  
of the docu-  
ment, where  
there is a  
presumption of  
law contrary  
to that effect,  
—extrinsic

In *Kirk v. Eddowes* (q), a father bequeathed £3000 for the separate use of his daughter for life, with ulterior trusts for her children. Subsequently he gave the daughter and her husband a promissory-note for £500. The defendants alleged the £500 to have been intended as a satisfaction *pro*

(o) 1 Dr. & War. 94.

(p) 3 Hare, 509.

(q) *Ibid.*

*tanto* of the legacy of £3000, and tendered parol evidence consisting of the declarations of the testator at the time of handing over the note, that it was to be in part satisfaction of the legacy of £3000. The question was, — Whether these contemporaneous declarations were to be admitted, it being observed that in this case the law did raise a presumption of partial satisfaction. Wigram, V.-C., held that this evidence was admissible, and on the following grounds : — “ If a second instrument do not in terms adeem the first, but the case is of that class in which, from the relation between the author of the instrument and the party claiming under it (as in the actual or assumed relation of parent and child), or on other grounds, *the law raises a presumption that the second instrument was an ademption of the gift by the instrument of earlier date*, evidence may be gone into, to show that such presumption is not in accordance with the intention of the author of the gift; *and where evidence is admissible for that purpose, counter-evidence is also admissible*. In such cases, the evidence is NOT admitted on either side for the purpose of proving *in the first instance* with what intent either writing was made, but for the purpose only of ascertaining whether the PRESUMPTION which the law has raised be well or ill founded. . . . The evidence does not touch the will, it proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. *Ademption of the legacy, and not revocation of the will*, is the consequence for which the defendant contends ” (r).

evidence is  
admissible,—  
*Kirk v.*  
*Eddowes.*

---

(r) See further, upon the admissibility of extrinsic evidence, *Wigram's Extrinsic Evidence in Interpretation of Wills*, 4th edit., 1858.

## CHAPTER XIV.

## ADMINISTRATION OF ASSETS.

Administra-  
tion.

WHERE a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, it often becomes material to consider the order and sometimes the proportions and mode in which the several classes of property are applicable to the liquidation of his debts. Every description of property, whether it be real or whether it be personal estate, is now liable for the payment of debts; but for various reasons, some of them historical, and others of them merely natural, certain species of property are liable before others. When regarded in its relation to this general liability to debts, property is called *assets*, and assets again have been distinguished as *legal* and as *equitable* assets.

1. Legal  
assets.

Legal assets was the name used to denote such portions of the property of a deceased person as were available at common law for the payment of his debts.

2. Equitable  
assets.

Where, however, the assets were such as were available *only* in a court of equity, they were termed *equitable assets*. But it should be observed that property was not equitable assets, merely because it was an object of equitable jurisdiction. The true principle was thus laid down by V.-C. Kindersley, in *Cook v. Gregson* (a), "The general proposition is clear enough,

---

(a) 3 Drew. 549; and see *Hilliard v. Fulford*, L. R. 4 Ch. Div. 389; *Job v. Job*, L. R. 6 Ch. Div. 562.

that when assets may be made available in a court of law, they are legal assets; and when they can only be made available through a court of equity, they are equitable assets. This proposition, however, does not refer to the question whether the assets can be recovered by the executor in a court of law, or in a court of equity.

*The distinction refers to the remedies of the creditor, and not to the nature of the property.* The question is not, whether the testator's interest was *in se* legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a court of law, or can only obtain it through a court of equity. This, I apprehend, is the true distinction. If a creditor brings an action at law against the executor, and the executor pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, and whatever assets the court of law, in trying that question, would charge the executor with, must be regarded as legal assets. . . . I think the general principle is, that a court of law would treat as assets every item of property come to the hands of the executor, which he has recovered, or had a right to recover, merely *virtute officii*, i.e., which he would have had a right to recover, if the testator had merely appointed him executor, without saying anything about his property or the application thereof."

Distinction referred to the creditor's remedies.

Legal assets were those recoverable by the executor *virtute officii*, and with which he was therefore chargeable in an action at law by a creditor.

The distinction between legal and equitable assets was formerly much more important than it is now, that importance consisting in this, viz., that out of legal assets, debts of different degrees, as being either specialty or simple contract debts, were payable in certain defined priorities, in a due course of administration, that is to say, the specialty before the simple contract debts; but out of equitable assets, these two different degrees of debts were payable *pari passu* without any priority the one over the other. And this appears to be all that was meant when it was (inaccurately) stated that

Legal and equitable assets,—importance of distinction between, formerly and at present.

out of equitable assets *all* debts were payable *pari passu*. Where the court had to deal with a mixed fund of legal and equitable assets, and specialty creditors by virtue of their legal priority had exhausted the legal assets, the court, on the ground that he who seeks equity must do equity, would marshal the equitable assets in favour of the simple contract creditors by paying thereout the debts of the latter up to an equality with the specialty creditors, before proceeding to a *pari passu* distribution of the residue of the equitable assets (*b*). However, the distinction has recently lost much of its importance, an Act having been passed in 1869 to abolish the priority of specialty over simple contract debts (*c*), in the administration of the legal assets of deceased persons whose deaths shall have happened on or after the 1st January 1870. And under the Supreme Court of Judicature Act, 1875 (hereinafter mentioned), a still greater equality in the payment of debts has been introduced in the case of people dying insolvent on or after the 1st November 1875.

The order of priority in the payment of debts,—out of legal assets, as regards deaths before 32 & 33 Vict., c. 46.

In cases, however, which do not fall within the Act of 1869, that is to say, in the case of persons dying before the 1st January 1870, the following was the order in which the different species of debts were payable out of *legal* assets:—

1. Debts due to the Crown by record or specialty (*d*).
2. Debts to which particular statutes give priority (*e*), *e.g.*, income tax (*f*), poor rates (*g*).

---

(*b*) *Plunket v. Penson*, 2 Atk. 290; *Bain v. Sadler*, L. R. 12 Eq. 570; and see *Ashley v. Ashley*, L. R. 1 Ch. Div. 243; 4 Ch. Div. 757.

(*c*) Stat. 32 & 33 Vict., c. 46.

(*d*) 2 Inst. 32.

(*e*) See 17 Geo. II., c. 38, s. 3; 58 Geo. III., c. 73, ss. 1 & 2; 18 & 19 Vict., c. 63, s. 23; 4 & 5 Will. IV., c. 40, s. 12; and *Moors v. Marriott*, 7 Ch. Div. 543.

(*f*) *Re W. J. Henley & Co. Limited*, 26 W. R. 885.

(*g*) *In re Booth, Fisher v. Shirley*, W. N. 1879, 108.



3. Judgments duly registered (*h*), and unregistered judgments, if recovered against the personal representatives (*i*).

4. Recognisances and statutes.

5. Debts by specialty contracts, for valuable consideration, whether the heir be, or be not, bound (*j*), arrears of rent service, even though the rent be reserved by parol, ranking equally with specialties (*k*).

6. Debts by simple contract, unregistered judgments against the deceased only ranking *pari passu* with debts by simple contract (*l*).

7. Voluntary bonds; but if a voluntary bond had been assigned for value, at any rate in the life of the obligor, it would, in the administration of assets, stand on the same footing as a bond originally given for value, that is to say, in the 5th group of debts (*m*).

By running together into one and the same group of debts, the debts comprised in the 5th and the 6th of the above-mentioned groups, you obtain the order in which the different species of debts were always payable out of *equitable* assets; and in cases where the recent Act of 1869 lastly before mentioned applies, the order last mentioned is also the order in which the different species of debts are now payable out of *legal* assets, also,—the effect of that Act (wherever it applies) being to abolish in every administration action the distinction between legal and equitable assets (*n*).

The order of priority in the payment of debts,—out of *equitable* assets and also (under the Act of 1869) out of *legal* assets.

The priority above specified is that which is observed Executor may

(*h*) Stats. 2 & 3 Vict., c. 11; 18 & 19 Vict., c. 15; 23 & 24 Vict., c. 38, ss. 3, 4, 5; 27 & 28 Vict., c. 112, s. 1.

(*i*) *Re Williams*, L. R. 15 Eq. 270; *In re Stubbs, Hanson v. Stubbs*, 8 Ch. Div. 154. (*j*) 9 Co. 88 b.

(*k*) Com. Dig. Admin., c. 2; *In re Hastings, Shirreff v. Hastings*, L. R. 6 Ch. Div. 610.

(*l*) *Re Turner*, 12 W. R. 337; 23 & 24 Vict., c. 38; *Kemp v. Waddingham*, L. R. 1 Q. B. 355.

(*m*) *Ramsden v. Jackson*, 1 Atk. 294; *Payne v. Mortimer*, 4 De G. & J. 447.

(*n*) *Job v. Job*, L. R. 6 Ch. Div. 562.

prefer one creditor to another, although of different degrees,—until decree or receiver or injunction.

where the assets are applied in a due course of administration; but there is nothing to prevent an executor, even to the present day, paying one creditor (although of an inferior degree) before any other creditor (although of a superior degree),—at least at any time before decree in an administration action, when no receiver of the estate has been appointed (*o*). In order to prevent such preferential payment, it is necessary either to obtain the appointment of a receiver in the action before decree, or else to obtain a speedy consent decree for administration (*p*).

I. Legal assets,—enumeration of.

It is not worth while to enumerate all the varieties of legal assets; but it may be usefully noticed here, that lands not charged with the payment of debts were for the first time made liable at all for the payment of debts generally in 1833, and were made *legal* assets, although to be administered only in equity, by the statute 3 & 4 Will. IV., c. 104, which extended to deceased non-traders, the remedy given in 1807 by the statute 47 Geo. III., c. 74, against deceased traders. The statute 3 & 4 Will. IV., c. 104, enacts that the real estate of a deceased person, “which he shall not by his last will have charged with, or devised subject to, the payment of his debts, shall be administered in courts of *equity*, for the payment of the just debts of such person, as well debts due on *simple contract*, as on *specialty*.” But the Act preserved the rights of creditors by specialty in which the heirs were bound as regarded estates devolving by descent; and the Act also further provided that, in the administration of real estate made liable by the Act, such last mentioned creditors should be paid in full in priority to simple contract creditors and creditors by specialty in which

---

(*o*) *Darston v. Lord Orford*, Prec. Ch. 188; *In re Radcliffe*, 7 Ch. Div. 733.

(*p*) *In re Stubbs' Estate*, *Hanson v. Stubbs*, 8 Ch. Div. 154.

the heirs were not bound. But the Act of 1869 (where it applies) has clearly abolished the priority that was preserved by the Act 3 & 4 Will. IV., c. 104, as between at least these different species of creditors themselves. It may also be noticed that estates *pur autre vie* are likewise *legal* assets, although the executor may have to go into a court of equity in order to obtain them (q); also, that the equity of redemption of a sum of money charged on land (r) and also of leaseholds, is *legal* assets in the hands of the executor.

*Equitable assets are of two kinds, viz. :—*

II. Equitable  
assets,—  
varieties of.

Either (1.) Equitable assets which are so by virtue of their own nature and character. They are not attainable by the executor *virtute officii*, and are not chargeable against the executor in an action at law by a creditor; or rather they were not so chargeable, prior to the Judicature Acts, 1873-75; but, *semble*, the executor would now be chargeable with them even at law.

Or (2.) Equitable assets which are so created by the act of the testator, *e.g.*, by charging or devising his land for the payment of his debts.

1. Equitable assets, which are so by the nature and character of the property, and which are not attainable by the executor, *virtute officii*, consist of the following properties, viz. :—

1. Equitable  
assets by na-  
ture of pro-  
perty itself,—  
enumeration  
of.

(a.) Property over which the testator has exercised a general power of appointment is equitable assets (s).

(a.) Property  
actually ap-  
pointed in  
exercise of  
general power.

(q) *Christy v. Courtenay*, 26 Beav. 140.

(r) *Cook v. Gregson*, 3 Drew. 547; *Mutlow v. Mutlow*, 4 De G. & J. 539; Wms. on Assets, 6.

(s) *Pardo v. Bingham*, L. R. 6 Eq. 485.

(b.) Separate estate of married woman.

(b.) The separate estate of a married woman is administered as equitable assets, all her creditors being paid *pari passu*, because it is only through a court of equity that they can make her separate property available (t). Such property has, in fact (or at least, prior to the Judicature Acts, 1873-75, had, in fact), no existence in the view of a court of common law,—unless so far as regards statutory separate estate.

2. Equitable assets by act of testator,—enumeration of.

2. The second kind of equitable assets is that created by the act of the testator charging or devising his land for the payment of the debts (u).

Charge of debts distinguished from trust.

Besides a great difference in the order of administration (v), to be hereafter noticed, there is an important distinction between an *express* devise of lands on trust for the payment of debts, and a mere charge of debts upon the lands. When a trust of lands is created, the conscience of the trustee is affected; the creditor is put under his care, and it becomes the special duty of the trustee to look after him; and it has always been the rule of equity, and under the Judicature Act, 1873, sect. 25, sub-sect. 2, it is now a rule in all the courts, that as between an express trustee and his *cestui que trust*, no length of time is a bar (w). But if the creditors have merely a charge upon the lands in their favour, they must look after themselves, for otherwise they will be barred after twenty years by the statute of limitations, 3 & 4 Will. IV., c. 27, s. 40 (x). But note, that if a testator bequeath his per-

In a trust for payment of debts, lapse of time no bar.

In a charge, creditors may be barred by lapse of time.

---

(t) *Bruere v. Pemberton*, cited as *Anon.* 18 Ves. 258; *Owens v. Dickenson*, Cr. & Ph. 48, 53; *Murray v. Barlee*, 3 My. & K. 209; *In re Poole's Case*, *Thompson v. Bennett*, L. R. 6 Ch. Div. 739.

(u) 3 & 4 Will. IV., c. 104.

(v) *Harmood v. Oglander*, 8 Ves. 124.

(w) *Hughes v. Wynne*, Turn. & Russ. 309; *Townshend v. Townshend*, 1 Cox. 29, 34; 3 & 4 Will. IV., c. 27, s. 25; 36 & 37 Vict., c. 66, s. 25, § 2.

(x) *Jacquet v. Jacquet*, 27 Beav. 332; but see Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57, s. 8), reducing the 20 years to 12.

sonal estate upon an express trust for the payment of his debts, the statutes of limitation still run against the creditors,—the reason being that such a bequest is in effect inoperative, seeing that the personal estate is, by law, primarily liable to the payment of the debts, and the testator, by professing to create a trust of it for that purpose does nothing, or merely does that which the law has already done (*y*). But note also, that a trust of *personal* estate even, for payment of debts, when the trust is created by *deed* (and not by *will*), is an effectual express trust, against which length of time is no bar.

In order to prevent the injustice, which, previously to the late enactment, many times resulted to creditors, in consequence of a testator not having charged his debts upon his real estate, courts of equity, by straining a little the ordinary rules of construction, laid it down as a rule in this class of cases, that a mere general direction by a testator, that his debts should be paid, effectually charged them on his real estate: and such rule of construction is still in practice in the courts, notwithstanding that the original occasion for it has either ceased altogether or been minimised. Thus, in *Legh v. Earl of Warrington* (*z*), a testator commenced a will thus:—"As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following: (that is to say), *Imprimis*, I will that all my debts which I shall owe at the time of my decease, be discharged and paid out of my estate;" and he then disposed of his real and personal estate, charging the former with an annuity. It was contended that these were merely introductory words, and did not indicate an intention to charge the real estate generally with the debts.

What amounts to a charge of debts.

A general direction by testator for payment of his debts.

(*y*) *Scott v. Jones*, 4 Cl. & Fin. 382; and see 3 & 4 Will. IV., c. 27, s. 40.

(*z*) 1 Bro. P. C. Toml. ed. 511.

But the House of Lords, affirming a decree of Lord King, held the real estate to be charged with the debts. And it is not necessary that such expressions as "*Imprimis*" should be at the beginning of the will. "I do not think," observed Shadwell, V.-C., in *Graves v. Graves*, (a), "that the charge is made to rest on the mere circumstance that the testator has used the words, '*imprimis*,' or 'in the first place,' for if a testator directs his debts to be paid, is it not in effect a direction that his debts shall be paid in the first instance?"

**Exceptions.** There are, however, certain exceptions to the general rule, viz. :—

1. Where testator has specified a particular fund for payment of debts. 1st, Where the testator, after a general direction for the payment of his debts, has specified a particular fund for the purpose; "because the general charge by implication is controlled by the specific charge made in the subsequent part of the will" (b).

2. Where executors, not being also devisees, are directed to pay the debts. 2d, Where the debts are directed to be paid by the executors who are not at the same time devisees of the real estate (c); for, in that case, it will be presumed that the debts are to be paid exclusively out of the assets which come to them as executors.

Debts to be paid out of rents and profits. A direction to raise money for payment of debts out of rents and profits of real estate, will authorise the sale or mortgage of the estate for that purpose (d).

Lien on land Where a person has a direct lien upon the lands as

---

(a) 8 Sim. 55.

(b) *Thomas v. Britnell*, 2 Ves. Sr. 313; *Price v. North*, 1 Ph. 85.

(c) *Cook v. Dawson*, 3 De G. F. & J. 127; *Finch v. Hattersley*, 3 Rus. 345 n.

(d) *Bootle v. Blundell*, 1 Mer. 232; *Metcalfe v. Hutchinson*, L. R. 1 Ch. Div. 591; *In re Brooke*, *Brooke v. Rooke*, L. R. 3 Ch. Div. 630.

mortgagee or otherwise, his right of priority will not be affected by any such general charge of debts (e). not affected by a charge of debts.

Neither debts by specialty, in which the heirs are bound, nor simple contract debts, even since 3 & 4 Will. IV., c. 104, which made the land of a deceased debtor assets, constitute a lien or charge upon the land in the hand either of the debtor or of his heir or devisee. The latter may alienate the lands before any proceedings are taken by the creditors to make them liable, and in the hands of the alienee, whether upon an ordinary purchase or upon a settlement, even with notice that there are debts unpaid, the land is not liable, though the heir or devisee remains *personally* liable to the extent of the value of the land (f). Neither specialty nor simple contract debts are a lien on the lands.

By the supreme Court of Judicature Act, 1875, it is enacted that, "in the administration by the court of the assets of any person who may die after the commencement of this Act, *and whose estate may prove to be insufficient for the payment in full of his debts and liabilities*, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities, respectively, as may be in force for the time being under the law of Bankruptcy, with respect to the estates of persons adjudged bankrupt." Administration under the Judicature Act 1875 (38 & 39 Vict. c. 77), s. 10.

*N.B.*—The corresponding sub-section in the Judicature Act, 1873 (viz., s. 25, sub-section 1), never had any operation (g).

In Bankruptcy, a secured creditor may either,— Rights of se-

(e) *Child v. Stephens*, 1 Vern. 101, 103.

(f) *Morley v. Morley*, 5 De G. M. & G. 610; *Carter v. Saunders*, 2 Drew. 248; *Kinderley v. Jervis*, 22 Beav. 1.

(g) *Sherwen v. Selkirk*, W. N. 79, p. 123, disapproving *Hilton v. Jones*, 9 Ch. Div. 620.

cured creditors.

(1.) Rest on his security, and compel the trustee to redeem him, or (2.) may realise his security, or apply to have it realised under the direction of the court (*h*); and in the event of the security proving deficient he can prove for the *deficiency* only. The former rule *in equity* was, that the creditor might, in addition to his rights under his security, prove for the *whole* amount of his debt against the general estate (*i*).

Secured creditors, — who are, and who are not.

A landlord, in respect of his arrears of rent, is not (in the winding up of companies) a secured creditor within the meaning either of the Bankruptcy Act, 1869, or the Judicature Act, 1873 (*j*); but a judgment creditor who has obtained a garnishee order, is a secured creditor (*k*); and likewise the holder of a bill of sale, although unregistered (*l*).

Bankruptcy rules, — how far introduced, in administration of insolvent estates.

*N.B.*—This 10th section of the Judicature Act, 1875, although apparently intended to apply only to questions between secured and unsecured creditors, has been construed by the courts (not without some difference of opinion) to introduce all the rules of the Bankruptcy Act, 1869, into the administration of estates of deceased insolvents (*m*); and as in Bankruptcy administration all debts are paid *pari passu* (excepting the immaterial exceptions therein specified), it follows that in the administration of the estates of persons dying insolvent on or after the 1st November 1875, all debts (including even voluntary bonds) (*n*)

---

(*h*) Robson on Bankruptcy, 277; *In re Suche & Co*, L. R. 1 Ch. Div. 48.

(*i*) *Kellock's Case*, L. R. 3 Ch. App. 769.

(*j*) *In re Coal Consumers' Co.*, *ex parte Hughes*, 25 W. R. 300; *In re Printing and Numerical Co.*, 8 Ch. Div. 535.

(*k*) *Ex parte Joselyne*, *in re Watt*, 8 Ch. Div. 327.

(*l*) *In re Knott*, 7 Ch. Div. 549 n.

(*m*) *In re Printing and Numerical Co.*, 8 Ch. Div. 535; *Moore v. Anglo-Italian Bank*, 10 Ch. Div. 681; but see *In re Richards & Co.*, 11 Ch. Div. 676; *In re Crumlin Works*, 11 Ch. Div. 755.

(*n*) *Ex parte Pottinger*, *in re Stewart*, 8 Ch. Div. 621; and see *Albion Steel Co.*, 7 Ch. Div. 547.



are now paid *pari passu*, other than and except Crown debts,<sup>5</sup> to which the Bankruptcy Act, 1869, does not apply (o).

The maxim, "equality is equity," is not extended to legatees jointly with creditors. Thus, although land may be devised in trust for, or charged with the payment of debts and legacies, the debts will in all cases have precedence of the legacies, on the ground that a man must first do what is just before he attempts what is generous. On the other hand, legatees and devisees, as being express objects of a testator's generosity or bounty are respectively preferred to the next of kin and to the heir-at-law of the testator; and among legatees, residuary legatees are considered the least objects of such express generosity, although it is otherwise with residuary devisees, for these latter rank on the same level as other devisees (p).

Legatees postponed to creditors.

From these and such like considerations, the courts have established in the administration of assets, the following order in the liability to debts of the different properties (but as between such properties themselves only) belonging to the testator at the time of his decease, that is to say,—

Order of the liability to debts of the different properties of testator,—as between such properties themselves only.

1. The general personal estate, not bequeathed at all or by way of residue only.
2. Real estate devised for the payment of debts.
3. Real estate descended.
4. Real estate devised specifically or by way of residue, and being at the same time charged with the payment of debts.
5. General pecuniary legacies, including annuities,

(o) *Ex parte Postmaster-General, in re Bonham*, 10 Ch. Div. 595.

(p) *Walker v. Meager*, 2 P. W. 551; *Kidney v. Coussmaker*, 12 Ves. 154; *Hooper v. Smart*, L. R. 1 Ch. Div. 90; *Roper v. Roper*, L. R. 3 Ch. Div. 714.

and including also demonstrative legacies which have become general.

6. Specific legacies (including demonstrative legacies that have remained demonstrative) and real estate devised specifically or by way of residue, and not being at the same time charged with debts.

7. Personalty or realty subject to a general power of appointment, and which power has been actually exercised by deed (in favour of volunteers) or by will.

8. Paraphernalia of widow.

1. The general personal estate,—primary liability of.

Question,—What exonerates the personalty.

1. The general personal estate, not bequeathed at all, or by way of residue only, and which is in general legal assets, is first liable. But of course the testator may have exonerated it from its primary liability, and such exoneration may be either express or implied. Thus, if the testator has appropriated any specific part of his personal estate for the payment of his debts, and has also disposed of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts in exoneration and exemption, so far, at least, of the general residuary estate. If, however, he has made no disposition of his general residuary personal estate, then, notwithstanding such an appropriation, the general residuary personal estate, thus remaining undisposed of, will still remain subject to its primary liability to pay the debts. It requires, in fact, very strong language on the part of the testator to exonerate his general personal estate from its primary liability to the payment of his debts. Of course, nothing that he can say can deprive his creditors of their legal rights to resort primarily to his personal estate; *but as between the several persons to whom his property may be bequeathed or devised*, who therefore take as volunteers under him, he may, if he pleases, vary the priorities; but to do this he must show an intention not only to charge his real estate with his debts, but also to exonerate his personal estate

therefrom. Thus neither a general charge of the debts upon the real estate, nor an express trust created by the testator for the payment of his debts out of his real estate, or any part thereof (*q*), will be sufficient to exonerate the personal estate from its primary liability to pay them. Nor will it alter the case that the charge or trust for payment out of the real estate comprises also the testator's funeral and testamentary expenses (*r*), though this circumstance is not without its weight, if there be in the will other indications of an intention to exonerate the personalty. If, therefore, the personal estate be simply given to some legatee, and more particularly if the articles given be specifically mentioned, the indication thus afforded of the testator's wish that the personalty shall come clear to the legatee, will, if coupled with an express trust for payment of the funeral and testamentary expenses out of the real estate, be sufficient to exonerate the personalty (*s*). But if the personalty be simply given to the executor, or if the gift be merely of the residue of the personal estate, the personal estate will not be exempt (*t*). In short, an intention must appear to give the personal estate *as a specific legacy* to the legatee; and if this be the case, it will be exempt, and will be removed to that distant rank in point of liability in which all specific devises and bequests are held to stand (*u*).

Answer,—  
There must be both a discharge of the personalty and a charge of the realty.

By Locke King's Act (*v*), the rule, that the personalty of a testator is the primary fund for the payment of his debts, was broken in upon, with respect to mortgages of land. This Act enacts, that "when any person shall, after the passing of the Act, die, seised of, or

Exoneration of general personal estate from mortgage debts.  
By 17 & 18 Vict. c. 113 (Locke King's Act),

(*q*) *Tower v. Rous*, 18 Ves. 132; *Collis v. Robins*, 1 De G. & Sm. 131.

(*r*) *Brydges v. Phillips*, 6 Ves. 570.

(*s*) *Greene v. Greene*, 4 Mad. 148; *Lance v. Aglionby*, 27 Beav. 65.

(*t*) *Aldridge v. Wallscourt*, 1 Ball. & B. 312.

(*u*) Wms. on Assets, 181.

(*v*) 17 & 18 Vict., c. 113.

mortgaged  
estate pri-  
marily liable.

entitled to, any estate or interest in *any land or other hereditaments*, which shall, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will, or deed, or other document, *have signified any contrary or other intention*, the heir or devisee to whom such lands or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the lands or hereditaments so charged shall, *as between the different persons claiming (w) through or under the deceased person*, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof." The Act is not, of course, to prejudice the mortgagee's right to payment out of the personal estate; but the Act, unless excluded, applies to every person claiming under a will, deed, or document, dated on or after the 1st of January 1855.

It is proposed briefly to consider—

- I. The law applicable to cases not within the statute.
- II. The effect and construction of the statute.

I. The law applicable to cases not within the statute.

a. Personalty  
primarily  
liable, unless  
mortgaged  
estate devised  
*cum onere*, or  
personalty  
exonerated.

(a.) The heir and also the devisee are *primâ facie* entitled to have the descended and devised realty exonerated from the mortgage debt, and to have that debt paid out of the personal estate. If, therefore, the debt has been contracted by the deceased person himself, the personalty is the primary fund for its payment, the reason being that the personal estate was swelled

---

(w) *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

by the mortgage money at the expense of the realty just as much as the realty is now to be swelled at the expense of the personalty. What went into the deceased's personal pocket should also come out of same. Of course, however, even under the old law, the mortgaged estate may have been devised *cum onere*, or the personal estate may have been exempted by express words, or by necessary implication<sup>(x)</sup>, in either of which cases the mortgaged lands would have borne the burden of the mortgage debt.

(b.) If the mortgage debt was not the personal debt of the deceased devisor or ancestor, but the debt of a previous owner of the mortgaged estate, in other words, if the mortgage debt is an ancestral mortgage, the mortgaged estate is the primary, and the personalty is only the collateral, fund for its payment; consequently the devisee, or heir-at-law, as the case may be, will, as a general rule, take the devised or descended estate with the burden of the ancestral mortgage on it, and will not be entitled to call upon the personal estate for exoneration. But, if the ancestor or devisor has adopted the debt as his own personal debt, the ordinary rule applies<sup>(y)</sup>, and the mortgaged estate is in that case entitled to complete exoneration at the expense of the personal estate.

b. Mortgaged estate is primary fund, when mortgage is an ancestral debt.

Unless it be adopted as a personal debt.

As to what acts do or do not amount to an adoption of the mortgage debt by the owner of the estate, so as to make the personalty primarily liable to discharge it, the reader is referred to the cases cited below (z).

---

(x) *Davies v. Bush*, 4 Bligh, N. S. 305; *Townshend v. Mostyn*, 26 Beav. 72, 76; *Newhouse v. Smith*, 2 Sm. & Giff. 344.

(y) *Scott v. Beecher*, 5 Mad. 96.

(z) *Evelyn v. Evelyn*, 2 P. Wms. 659; *Hedges v. Hedges*, 5 De G. & Sm. 330; *Bagot v. Bagot*, 13 W. R. 169; *Swainson v. Swainson*, 6 De G. M. & G. 648; *Bond v. England*, 2 K. & J. 44; *Loosemore v. Knapman*, Kay, 123.

## II. The effect and construction of the statute.

Copyholds and freeholds are within the statute; *quære* as to leaseholds.

(a.) It seems that copyholds as well as freeholds are within its provisions; but it was thought doubtful whether leaseholds were so, for the words of the Act are, "The heir or devisee to whom such lands or hereditaments shall *descend* or *be devised*" (a)—and these words were inapplicable to leasehold hereditaments. Eventually it was decided that the Act did not apply to leasehold hereditaments (b), and accordingly an amending Act (c) has been passed for the purpose of bringing leaseholds within it. The amending Act applies to any testator or intestate dying after the 31st December 1877 seised or possessed of or entitled to any *lands or other hereditaments of whatever tenure* which shall at the time of his death be charged with any mortgage or equitable charge or with any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum discharged out of any other estate of the testator or intestate unless in the case of a testator he shall have signified a contrary intention.

Leaseholds are included in amending Act, 1877.

Act refers only to specified charges.

(b.) The words "sums by way of mortgage," occurring in the principal Act, have been held to apply only to a defined or specified charge on a specified estate (d). The principal Act was held to be applicable also to an equitable mortgage of freeholds by deposit of title-deeds and memorandum (e). But it was held that the Act did not apply to a vendor's lien for unpaid purchase-money (f), consequently an amending Act, 30 & 31

Vendor's lien under 30 & 31 Vict., c. 69,

(a) *Piper v. Piper*, 1 J. & H. 91.

(b) *Solomon v. Solomon*, 33 L. J. Ch. 473; *In re Wormsley's Estate*, *Hill v. Wormsley*, L. R. 4 Ch. Div. 665.

(c) 40 & 41 Vict., c. 34.

(d) *Hepworth v. Hill*, 30 Beav. 476.

(e) *Pembroke v. Friend*, 1 J. & H. 132.

(f) *Hood v. Hood*, 5 W. R. 747; *Barnwell v. Iremonger*, 1 Dr. & Sm. 255, 260.

Vict., c. 69, s. 2, was passed, whereby it is enacted and under that the word "mortgage" in the principal Act shall <sup>40 & 41 Vict., c. 34.</sup> be deemed to extend to any lien for unpaid purchase-money, on any lands or hereditaments purchased by a *testator*. The case of a purchaser who dies *intestate* (by what appears to be a curious oversight) is not, *quoad* this matter of lien, within the amending Act (g); but under the further Amendment Act of 1877, partly stated above, this omission is provided for.

*N.B.*—Under the operation of Locke King's Act, <sup>Rateable incidence of mortgage, in case of mixed security.</sup> and the two several Acts amending same, as above stated, where a mortgage is made of a mixed fund of real and personal property, the incidence of the liability is upon both the real and the personal property equally, and is *pro ratâ*, neither being exempt in favour of the other (h).

(c.) What is a "contrary or other intention" within the meaning of the principal Act? The cases on this subject have been somewhat conflicting; but the current of authority seems to be *against* the rule laid down by Lord Campbell, in *Woolstencroft v. Woolstencroft* (i) as follows:—"I think the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed, with respect to exempting the personal estate, the mortgaged land being now primarily liable,"—that is to say, there must be both a discharge of the real estate and a charge of the personal estate. However, in *Eno v. Tatham* (j), Turner, L. J., said, <sup>The true rule in *Eno v. Tatham*,—it is sufficient to</sup> "The appellant's counsel has relied on the dictum of Lord Campbell in *Woolstencroft v. Woolstencroft*, that

(g) *Harding v. Harding*, L. R. 13 Eq. 493.

(h) *Trestrail v. Mason*, 7 Ch. Div. 655; and see *Leonino v. Leonino*, 10 Ch. Div. 460; *Early v. Early*, W. N. 1878, p. 204.

(i) 2 De G. F. & Jo. 347.

(j) 11 W. R. 475; and see *Gall v. Fenwick*, 43 L. J. Ch. 179.

charge the personal, without at the same time discharging the real estate.

the rule which had been before observed with respect to exempting personal estate should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money. This probably meant no more than that the intention should be clearly proved. If Lord Campbell intended to say that as before the Act it had been necessary to show an intention not only to charge the mortgaged estate, but also to discharge the personalty, so now it is necessary to show an intention, not only that another fund should be charged, but also that the mortgaged estate should be discharged, he (the Lord Justice) was not prepared to follow him. In order to take a case out of the Act, it was sufficient to show a contrary or other intention; this destroyed the analogy between the two cases. In the one case, the intention to be proved was contrary to a settled rule of the common law (meaning thereby, the principles of equity apart from statute); in the other case, it was contrary only to a statutory rule, expressly made dependent upon intention. . . . His opinion coincided with those cases in which it had been held that the mortgaged estates were not liable where there was a direction that the debt should be paid out of some other fund."

But not a mere general direction for payment of debts.

It has been decided that a mere general direction by the testator that the debts "shall be paid as soon as may be" (*k*), or that debts should be paid by "his executors out of his estate" (*l*), the source from which payment is to be made not being mentioned, will not show a contrary or other intention sufficient to exonerate the mortgaged estate from its primary liability. Where, however, the *personal* estate is

---

(*k*) *Pembroke v. Friend*, 1 J. & H. 132; *Coote v. Lowndes*, L. R. 10 Eq. 376.

(*l*) *Woolstencroft v. Woolstencroft*, 2 De G. F. & Jo. 347.



bequeathed on trust to pay (*m*), or subject to the payment of, debts (*n*), these words have been held sufficient to show a contrary intention within the meaning of the Act so as to charge the personalty primarily with the payment of the mortgaged debts on estates devised by the will.

But now by 30 & 31 Vict., c. 69, an Act to explain the Act of 17 & 18 Vict., c. 113, in the construction of the will of any person, who may die after the 31st day of December 1867, a general direction that the debts or all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the last-mentioned Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate (*o*).

Under 30 & 31 Vict., c. 69, the intention to charge the personalty with the mortgage-debts must be expressed or necessarily implied.

2. Lands devised to pay debts, and not merely devised charged with debts, are liable next after the personalty (*p*). These are equitable assets, and are therefore applicable in payment of debts by specialty and simple contract *pari passu*.

2. Lands expressly devised for payment of debts, equitable assets.

3. Real estates which have descended to the heir, but not charged with debts, are next liable (*q*). These are legal assets liable to debts by specialty binding the heir, but not before 47 Geo. III., c. 74, and 3 & 4 Will. IV., c. 104, to debts by a simple contract.

3. Realty descended, legal assets.

(*m*) *Moore v. Moore*, 1 De G. Jo. & Sm. 602.

(*n*) *Mellish v. Vallins*, 2 J. & H. 194.

(*o*) *In re Newmarch, Newmarch v. Storr*, 9 Ch. Div. 12.

(*p*) *Harwood v. Oglander*, 8 Ves. 125; *Phillips v. Parry*, 22 Beav.

279.

(*q*) *Davies v. Topp*, 1 Bro. C. C. 527; *Manning v. Spooner*, 3 Ves. 17; *Milnes v. Slater*, 8 Ves. 304; *Wood v. Ordish*, 3 Sm. & Giff. 125.

Devise to heir makes him a purchaser.

Since the Act for the amendment of the law of inheritance (*r*), when land is devised to the heir, he takes not as heir but as purchaser, and as such is placed in the same position in all respects as any other devisee of lands (*s*), that is to say, in the 6th (and not in the 3rd) line in the order of liability stated on p. 271, *supra*.

4. Realty devised charged with debts, equitable assets.

4. Real estates devised, specifically or by way of residue, and being at the same time charged with the payment of debts, are next liable, and, of course, *pro rata* (*t*). These are equitable assets, and debts are payable out of them *pari passu*.

Heir taking a lapsed devise.

If the heir takes by reason of a lapse or other failure, land devised charged with debts, the land so charged is applicable for payment of debts in the same order as devised estates, and not till after the real estates, which had descended (*u*), that is to say, it remains where it would have stood if it had not failed but taken effect, *i.e.*, in the 4th (and not in the 3rd) line in the order of liability.

A residuary devise is specific.

After the passing of the Wills Act, the question arose whether a residuary devise was still to be deemed specific, at least for the purposes of settling the order of liability in the administration of the assets of a deceased person. This question was answered in the affirmative in the case of *Hensman v. Fryer* (*v*), decided

(*r*) 3 & 4 Will. IV., c. 106.

(*s*) *Biederman v. Seymour*, 3 Beav. 368; *Strickland v. Strickland*, 10 Sim. 374.

(*t*) *Barnewell v. Lord Cawdor*, 3 Mad. 453; *Irvin v. Ironmonger*, 2 Russ. & My. 531.

(*u*) *Wood v. Ordish*, 3 Sim. & Giff. 125; *Stead v. Hardaker*, L. R. 15 Eq. 175. And see (as to lapsed personal estate), *Trethewy v. Helyar*, L. R. 4 Ch. Div. 53; *Fenton v. Wills*, L. R. 7 Ch. Div. 33. See also *In re Jones*, *Jones v. Caless*, 10 Ch. Div. 40.

(*v*) L. R. 3 Ch. App. 420; *Gibbins v. Eyden*, L. R. 7 Eq. 371; 2 Jarm. on Wills, 589; but see *Lancefield v. Iggulden*, 22 W. R. 726.

on appeal by Lord Chelmsford; and as Lord Chelmsford's decision, upon this point, has been since (after much professional and judicial conflict of opinion regarding it) approved and confirmed by Lord Cairns in the recent case of *Lancefield v. Iggulden* (*w*), the specific character of the residuary devise is now concluded by authority, and reason must assent to the decision.

5. General pecuniary legacies are next liable, and of course *pro rata* (*x*). 5. General pecuniary legacies.

6. Specific legacies (*y*) and real estates devised specifically, or by way of residue and not being at the same time charged with the payment of debts (*z*), are next liable, and of course *pro rata*, to contribute to the payment of debts by specialty, in which the heirs are bound (*a*), and also (it is conceived) to the payment of debts by simple contract and by specialty in which the heirs are not bound (*b*). 6. Specific legacies and devises *pro rata*.

In the above-mentioned case of *Hensman v. Fryer*, *Hensman v. Fryer*,—explained. Lord Chelmsford, after deciding that a residuary devise was still specific, further held (but apparently only to do particular justice in the particular circumstances of that case), that pecuniary legatees were entitled to call on residuary devisees to contribute rateably to the payment of debts, which the general personal estate was insufficient to satisfy. But this part of that decision which appeared to overrule a long series of authorities, decided, as well by courts of appeal, as by courts of

(*w*) L. R. 10 Ch. App. 136.

(*x*) *Clifton v. Burt*, 1 P. W. 680; *Headley v. Readhead*, Coop. 50.

(*y*) *Fielding v. Preston*, 1 De G. & Jo. 438; *Evans v. Wyatt*, 31 Beav. 217.

(*z*) *Mirehouse v. Scarfe*, 2 My. & Cr. 695; *Milnes v. Slater*, 8 Ves. 303.

(*a*) *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 655.

(*b*) *Collis v. Robins*, 1 De G. & Sm. 131.

first instance (*c*), has not been followed (*d*), and is not to be considered as laying down any general rule upon the subject; on the contrary, in *Lancefield v. Iggulden*, *supra*, Lord Cairns applied the general rule, and ranked (as it was only consistent to rank) residuary devises among specific devises for all the purposes of administration, that is to say, in the 4th line of liability if charged with the payment of debts, and in the 6th line of liability if not so charged, keeping company in each case with lands specifically devised.

7. Property over which testator has exercised a general power of appointment.

7. Real or personal property over which the testator has a *general* power of appointment, if and so far as he has *actually* exercised that power (*e*), whether by deed *in favour of volunteers*, or by will, is next applicable. In this case the property appointed will in equity form part of the appointor's assets, so as to be subject to the demands of his creditors in preference to the claims of his legatees or appointees (*f*).

8. The paraphernalia of the testator's widow occupies the last line in the order of liability, she being preferred to all legatees and devisees, and ranking, in fact, in the order of preference, next after the creditors of the deceased,—and that for the reason that her paraphernalia, although liable to her husband's debts, cannot be disposed away from her by his will alone.

he testator's intention is the guide.

The results of the chapter may be thus summed up in the words of a learned writer. "The order in which we have seen that the various portions of a testator's estate are applied for the payment of his debts, has

(*c*) 2 W. & T. 98; *Clifton v. Burt*, 1 P. Wms. 678; *Fielding v. Preston*, 1 De G. & Jo. 438.

(*d*) *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 235; and see *Tomkins v. Colthurst*, L. R. 1 Ch. Div. 626; *Farquharson v. Floyer*, L. R. 3 Ch. Div. 109.

(*e*) *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & Giff. 305; *Pardo v. Bingham*, L. R. 6 Eq. 485.

(*f*) *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; *Vaughan v. Vanderstegen*, 2 Drew. 165.

been established out of a regard to the testator's intention. The general personal estate was long the only fund to which those creditors who had not specialties binding the heir could resort; and besides, cash, stock, and movables come first to hand, and are the most readily applicable, and are the funds out of which people in their lifetime usually pay their debts. Next after the general personal estates, any special fund set apart by the testator would naturally come. The heir not being a beneficiary within the testator's intention, lands descended to him would properly follow next in the order of application. But lands charged with the payment of debts would, of course, be applicable before legacies bequeathed, or property specifically given and not so charged. Again, there seems a more direct intention to benefit a specific devisee or legatee than to benefit a mere pecuniary legatee. Pecuniary legacies must therefore go unpaid rather than specific devises or bequests be touched. These, however, must be resorted to for the payment of debts as a last resource, whilst lands over which the testator has exercised a *general* power of appointment are, in favour of creditors, considered as supplementarily applicable after the whole of the testator's own property has been exhausted" (g). And (it may be added) the paraphernalia come last of all. If from these various sources there is not enough to pay and satisfy all the debts, then the creditors are compelled to abate among themselves *pro rata*, and in a manner, therefore, to prey and feed upon each other for their own satisfaction *pro tanto*. But any creditor, who is at the same time executor of the deceased, may retain to himself his own debt in full (h), at least out of the legal assets, and as against other creditors in equal degree, but subject to certain restrictions (i).

Reasons why  
personality is  
primarily  
liable.

Intention to  
benefit shown  
more clearly  
in a specific  
than in a gene-  
ral legacy.

Retainer by  
executor.

(g) Wms. Real Assets, 108.

(h) 2 Wms. Executors, 971 (6th ed.); *Richmond v. White*, 10 Ch. Div. 727, reversed, W. N. 1879, 150; *Talbot v. Frere*, 9 Ch. Div. 568.

(i) *Ibid.*

## CHAPTER XV.

## MARSHALLING ASSETS.

The general principle of marshalling explained.

It must not be forgotten, that the order (stated and expounded in the preceding chapter) in which the several funds liable to the payment of debts are to be applied, regulates the administration of the assets *only as between or among the testator's own representatives, devisees, and legatees*, and does not affect the right of the creditors themselves to resort, in the first instance, to all or any of the funds to which their claims extend. It might have happened, therefore, in times preceding the Act, 3 & 4 Will. IV., c. 104, although it can hardly (if at all) happen now, that a creditor having a right to proceed against two or more funds proceeded against some fund which was the only resource of some other creditor, less amply provided for than himself. Equity would in such a case have held that the creditor having two funds should not, by resorting to the fund which was the only resource of another creditor, disappoint that other; but would have permitted the latter to stand, to the extent of his disappointment, in the place of the more favoured creditor, against the other fund, to which the less favoured creditor had no direct access, the object of the court in so doing being, that all creditors should be satisfied, so far as, by any arrangement consistent with the nature of their several claims, the property which they ought to affect could be applied in satisfaction of such claims (a).

---

(a) *Aldrich v. Cooper*, 2 L. C. 80.

It is proposed to examine the cases in which equity carries out this or an analogous principle—and here-under :—

Firstly, Marshalling as between creditors; and,

Secondly, Marshalling as between the beneficiaries entitled under the will.

Firstly, under the old law, before 3 & 4 Will. IV., c. 104, simple contract creditors had, as we have seen, no claim upon the real assets of a deceased person, unless these assets were charged with, or were devised for the payment of, debts. In the absence of such charge or devise, specialty creditors, who might in the first instance resort to the personal estate, in priority to simple contract creditors, and also to the real assets, in exclusion of simple contract creditors, would be compelled in equity to resort for the satisfaction of their debts, in the first place, to the real assets, as far as they went, so as to leave the personalty for the simple contract creditors; or if the specialty creditors had already exhausted the personal assets in payment of their claims, the simple contract creditors would be put to stand in their place against the real assets, whether devised or descended, *as far as the specialty creditors might have exhausted the personal assets.*

Two varieties of marshalling.

1. As between creditors. Under old law, simple contract creditors permitted to stand in shoes of specialty creditors as against the realty.

In *Aldrich v. Cooper* (b), decided before 3 & 4 Will. IV., c. 104, a mortgagee of freehold and copyhold estates, who was also a specialty creditor, having exhausted the personal assets, simple contract creditors were held entitled to stand in his place, against both the freehold and the copyhold estates, *so far as the personal estate was taken away from them by such specialty creditor.* And in *Selby v. Selby* (c), it was decided that

Marshalling against a mortgagee who exhausts or diminishes the personalty.

Also, against

(b) 2 L. C. 80.

(c) 4 Russ. 336.

an unpaid vendor, who does the like.

if the vendor of an estate, the contract for which was not completed in the lifetime of the testator who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, *to the extent of his lien on the estate sold*, as against the devisee of that estate.

Realty now assets for payment of all debts, 3 & 4 Will. IV., c. 104.

Freehold and copyhold estates being now, under 3 & 4 Will. IV., c. 104, liable to simple contract debts, the court is no longer under any such necessity of resorting to the doctrine of marshalling to enforce their payment (*d*). And the recent statute 32 & 33 Vict., c. 46, having abolished the priority of specialty over simple contract debts in the administration of the estates of all persons dying after the 1st of January 1870, questions of marshalling *as between creditors* have now become of little practical importance (*e*),—and of yet less importance in the case of persons dying insolvent on or after the 1st November 1875, as stated in the preceding chapter.

Priority of creditors abolished, 32 & 33 Vict., c. 46, and 38, & 39 Vict., c. 77, § 10.

No marshalling except between creditors of the same person.

Marshalling would not, unless founded on some equity, have been enforced as between persons, unless they were creditors of the same debtor, and had demands against funds the property of the same debtor. "It was never said," observed Lord Eldon, "that if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more; . . . but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity, giving B. the right for his own sake to seek payment from A." (*f*).

---

(*d*) *Cradock v. Piper*, 15 Sim. 301; *Gwynne v. Edwards*, 2 Russ. 289 n.

(*e*) See also 36 & 37 Vict., c. 66, s. 25, *supra*.

(*f*) *Ex parte Kendall*, 17 Ves. 520.



The court has applied the like principles to the marshalling of securities; but this subject is one of so difficult a character, and depends upon distinctions so minute, that it is hardly possible to express the law regarding it in anything like a brief and intelligible way. The following is an attempt to express the more salient points of the law :—

The general principle may be thus stated, adopting with some slight adaptation the words of Lord Hardwicke in *Lanoy v. Duke of Athole* (*g*), viz. :—If a person having two real estates, mortgages both estates to A., and afterwards mortgages one only of the estates to B., whether or not B. had notice of A.'s mortgage (*h*), the court directs A. (but always without prejudice to A.) to realise his debt out of that estate which is *not* in mortgage to B., so as to leave the one estate which is in mortgage to B. to satisfy B. so far as it goes.

This general principle of marshalling is applicable also as against a surety, to whom (on payment by him of the debt) A. may have assigned his two securities (*i*).

The principle is subject to the following restriction, viz., that the marshalling of securities is not enforceable by B. to the prejudice of C. (a third person) (*j*). The subject will be more fully discussed in the chapter on Mortgages, and in the chapter on Suretyship, *infra*.

Secondly, it remains to consider the doctrine of <sup>2</sup>. As between

---

(*g*) 2 Atk. 446.

(*h*) *Tidd v. Lister*, 10 Hare 157.

(*i*) *South v. Bloxam*, 2 Hem. & Mill. 457; *Robinson v. Gee*, 1 Ves. Sr. 252.

(*j*) *Averall v. Wade*, L. & G. t. Sugd. 252; *Barnes v. Racster*, 1 Yo. & Col. Ch. Ca. 401; *Thornycroft v. Crockett*, 2 H. L. Cas. 239.

the beneficiaries entitled under the will.

*The general principle of marshalling,—how derived from the order of the liability of the divers properties.*

marshalling as between the divers beneficiaries entitled under the will, and (in the case of partial intestacies) as between also the heir-at-law and the next of kin. In this group of cases, it is usually by reason of the disturbing action of the creditors of the deceased that the question of marshalling arises, although occasionally (as will be shown later on in this present chapter) it may arise from other causes. Now, where it arises from the disturbing action of creditors,—the general principle which runs through all the cases of marshalling as between beneficiaries may be arrived at in this way, viz.,—Taking the various properties specified on p. 271, *supra*, in the order of their respective liabilities to the payment of debts in the administration of assets as shown on that page, and substituting in the same order the various persons to whom these various properties would go if there were no debts to pay, and to whom they do, in fact, go, so far as they are not exhausted by the payment of debts, we obtain the following list of the persons entitled under the will (and otherwise) to participate in the property of the deceased testator, that is to say,—

1. The next of kin or the residuary legatees ;
2. The heir-at-law ;
3. The heir-at-law ;
4. The charged devisees (specific and residuary) ;
5. The pecuniary legatees ;
6. The devisees (specific and residuary) and the specific legatees ;
7. The general appointees by deed or will ; and,
8. The widow.

Now, the general rule of marshalling is derived from the preceding list of beneficiaries in this way, and is to this effect, viz. :—

That if any beneficiary in the above list is disappointed of his benefit under the will through the

creditor seizing upon (as he may) the fund intended for such disappointed person, then such person may recoup or compensate himself for that disappointment (to the extent thereof) by going against the fund or funds intended for (and in that way similarly disappointing in his turn) any one or more of the beneficiaries prior to himself in the above list; and such secondly disappointed person or persons may in his or their turn do the like against those prior to him or them, so that eventually the next of kin or residuary legatees (as the case may be) have to bear the disappointment without any means of redress; but nobody may go against any one posterior to himself on the list; and persons occupying the same rank in the list may have contribution (if not compensation) as against each other.

We proceed to test this rule in its application to the decisions. The general principle,—application of.

Although, with the exception of necessary wearing apparel (*k*), a widow's paraphernalia are liable to her deceased husband's debts, she will be preferred to a general legatee, and be entitled therefore to marshal assets in all cases in which a general legatee would be entitled to do so (*l*). And on principle it would seem to be settled also, that a widow, as to her paraphernalia, is to be deemed entitled to precedence also over specific legatees and devisees (*m*). In fact, both principle and the weight of authority point to the conclusion that a widow, as to her paraphernalia, is entitled to rank next after the ordinary creditors (*n*).

---

(*k*) *Lord Townshend v. Windham*, 2 Ves. Sr. 7.

(*l*) *Tipping v. Tipping*, 1 P. W. 730; *Boynton v. Parkhurst*, 1 Bro. C. C. 576.

(*m*) *Lord Townshend v. Windham*, 2 Ves. Sr. 7; *Probert v. Clifford*, Amb. 6; *Graham v. Londonderry*, 3 Atk. 395.

(*n*) *Wms. Real Assets*, 118.

Right of heir  
as to descended  
land.

If the heir-at-law has paid any debts, which ought to have been paid, first, out of the general personal estate, secondly, out of lands subject to a trust or power for their payment, he will have a right to have the assets marshalled in his favour, as against those two funds, but not to the prejudice of pecuniary legatees; still less to the disappointment of specific gifts; for the heir is not a devisee, while the general or specific legatees take by the special bounty of the testator (*o*).

Devisee of  
lands charged  
with debts.

A devisee of lands charged with the payment of debts paying any debts whilst any of the previously liable property remains unexhausted, will have a right to have the assets marshalled in his favour, and to stand in the place of the creditor so far as regards, 1st, the general personal estate; 2d, land subject to a trust or power for raising the debts; and, 3d, lands descended to the heir (*p*).

Position of a  
residuary de-  
visee.

Since the decision of Lord Chelmsford in *Hensman v. Fryer* (*q*), as affirmed and applied in *Lancefield v. Iggulden* (*r*), residuary devisees stand in the same position as specific legatees or devisees.

Against whom  
pecuniary  
legatees may  
marshal.

Pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by creditors, are entitled to be paid—

(*a*.) Out of lands which descend to the heir (*s*).

(*b*.) Out of lands devised simply subject to debts (*t*).

---

(*o*) *Hanby v. Roberts*, Amb. 128.

(*p*) *Harmood v. Oglander*, 8 Ves. 106.

(*q*) L. R. 3 Ch. App. 420; *Gibbins v. Eyden*, L. R. 7 Eq. 371.

(*r*) L. R. 10 Ch. App. 136; and see *Tomkins v. Colthurst*, L. R. 1 Ch. Div. 626; *Farquharson v. Floyer*, L. R. 3 Ch. Div. 109.

(*s*) *Sproule v. Prior*, 8 Sim. 189.

(*t*) *Rickard v. Barrett*, 3 K. & J. 289.

(c.) Out of lands subject to a mortgage, to the extent to which the mortgagee may have disappointed them by resorting first to the personal estate (*u*).

But pecuniary legatees have no right to marshal against lands comprised in a residuary devise any more than against specific legatees and devisees (*v*), unless such residuary devise should be charged with the payment of debts.

In this view of the law, specific legatees and devisees (including residuary devisees) have the right, if called on to pay any debts of their testator, to have the whole of his other property real or personal marshalled in their favour, so as to throw the debts as far as possible on the other assets, which are antecedently liable.

Specific legatees and devisees.

A specific devisee (including a residuary devisee) and a specific legatee contribute *pro rata* to satisfy the debts of the testator, which the property antecedently liable has failed to satisfy, for the testator's intention of bounty is equal in all these cases (*w*).

Contribute rateably, *inter se*.

If, however, the subject of any specific devise (including a residuary devise) or specific bequest is liable to any particular burden of its own, the devisee or legatee must bear it alone, and cannot call the other specific legatees or the other devisees to his aid. Thus, the devisee of land bought by the testator but not paid

If specific devisee or legatee take subject to a burden, he cannot compel the others of the same class to contribute.

(*u*) *Johnson v. Child*, 4 Hare, 87; and see *Lutkins v. Leigh*, Cas. t. Talb. 53 (where the creditors were mortgagees), and *Lord Lilford v. Powys-Keck*, L. R. 1 Eq. 347 (where the creditors were unpaid vendors). And compare *Wythe v. Henniker*, 2 My. & K. 635.

(*v*) *Lancefield v. Iggulden*, L. R. 10 Ch. App. 136, showing the true general application of the decision in *Hensman v. Fryer*, L. R. 3 Ch. App. 420.

(*w*) *Tombs v. Roch*, 2 Coll. 490, as explained in *Lancefield v. Iggulden*, *supra*.

for, cannot call on the other devisees or on the specific legatees to pay a proportion of the purchase-money to which his land is subject by reason of the vendor's lien, although prior to 30 & 31 Vict., c. 69, he might have claimed to have his land exonerated at the expense of every one else taking property antecedently liable (x).

Marshalling  
between lega-  
tees, where  
certain lega-  
cies are  
charged on  
real estate.

There is yet another case in which equity, out of regard to the testator's intention, marshals assets in favour of legatees. This case, however, does not depend on the same principle as those we have already mentioned; it does not arise in consequence of the disturbing action of any creditor who has taken some part of the assets out of their usual order, but simply from the presumption that when a testator leaves legacies, he wishes that if possible they should all be paid. To understand this branch of the subject, the reader must bear in mind that *even to the present day legacies are not payable out of real estate UNLESS the testator has charged his real estate with their payment (y)*, there never having been any statute passed to do for legacies what the statute 3 & 4 Will. IV., c. 104, has done for simple contract debts. If, therefore, a testator should leave certain legacies payable only out of his personal estate, and certain others which he has charged on his real estate, in aid of his personalty, and the personalty should not be sufficient to pay the whole, equity will marshal these legacies, so as to throw those charged on the real estate entirely on that estate, in order to leave more of the personalty applicable to the payment of the other legacies (z).

(x) *Emuss v. Smith*, 2 De G. & Sm. 722; and see also the cases cited on p. 275, footnote (z).

(y) As to what amounts to an implied charge of legacies upon land, see *Greville v. Browne*, 7 H. L. Ca. 789; and for the extent of such implied charge, see *Gainsford v. Dunn*, L. R. 17 Eq. 405.

(z) *Bonner v. Bonner*, 13 Ves. 379; *Scales v. Collins*, 9 Hare, 656; Wms. Real Assets, 115.

But where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequently to the death of the testator, as the death of the legatee before the time of payment, the court will not marshal assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible, whereas, as against the real estate, it would sink by the death of the legatee (*a*).

Where a legacy charged on real estate fails, it will not be treated as if it were not so charged, so as to be made transmissible.

Assets are never marshalled in favour of legacies given to charities, upon the ground that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court merely to support a bequest which is contrary to law. If, therefore, a testator should bequeath to a charity a legacy payable out of the produce of his real and personal estate (*b*), or a simple legacy without expressly charging it on that part of his personal estate which he may lawfully bequeath to charitable uses, the legacy will fail by law in the proportion which the real estate and personalty in the one case, or such personalty in the other, may bear to the whole fund out of which the legacy was made payable (*c*); or, as Lord Cottenham has expressed himself in *Williams v. Kershaw* (*d*), "The rule of the court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be to be paid out of the prohibited fund." But when it is said that the court will not marshal legacies in favour of charities, it is meant that the

Assets not marshalled in favour of charities.

(*a*) *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135.

(*b*) *Currie v. Pye*, 17 Ves. 462.

(*c*) *Robinson v. Geldard*, 3 Mac. & G. 735; *Fourdrin v. Goudey*, 3 My. & K. 397; *Johnson v. Lord Harrowby*, Johns. 425; *Hobson v. Blackburn*, 1 Keen, 273.

(*d*) 1 Keen, 275 n.; and see *Blann v. Bell*, 7 Ch. Div. 382.

court will not do so when the will is silent; because if (as is usually the case) the will expressly directs that the legacies shall be marshalled in favour of the charities, then the court is ready to carry out that direction, and it does so with a liberal hand (e).

---

(e) *Miles v. Harrison*, L. R. 9 Ch. App. 316; *Att.-Gen. v. Lord Mountmorris*, 1 Dick. 379; *Luckraft v. Pridham*, W. N. 1879, p. 94.



## CHAPTER XVI.

## MORTGAGES.

A LEGAL mortgage may be defined to be a debt by specialty, secured by a pledge of lands or other property, not being (like pew-rents) unmortgageable (*a*), of which the legal ownership is vested in the creditor, but of which in equity the debtor, and those claiming under him, remain for the time the actual owners. It is, therefore, necessary, first, to show what is the effect of a mortgage at common law, and then to show how equity has modified or altered the common law to suit the ends of practical justice. At law, the ordinary mortgage, or *mortuum vadium*, as it was called, was strictly an estate upon condition; that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment, or in a deed of defeazance executed at the same time, by which it was provided that on payment by the mortgagor, or feoffor, of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the condition was performed, the feoffor re-entered and was in possession of his old estate. If the condition was broken, the feoffee's estate became absolute and indefeasible, and all the legal consequences followed, as though he had been

Definition of mortgage.

Mortgage at common law.

An estate upon a condition.

Forfeiture at law on condition broken.

---

(a) *Ex parte Arrowsmith, in re Leveson*, 8 Ch. Div. 96.

absolute unconditional owner from the time of the feoffment (b).

Interference  
of equity.

Happily, a jurisdiction arose, under which the harshness of the common law was softened without any actual interference with its principles, and a system was established, at once consistent with the security of the creditor, and a due regard for the interests of the debtor (c). Our courts of equity, borrowing the doctrines of the civil law, did not indeed attempt to alter the legal effect of the forfeiture at common law; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain as owner for his own benefit what was intended as a mere pledge, and they adjudged that a breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had an "equity to redeem," on payment, within reasonable time, of principal, interest, and costs, notwithstanding the forfeiture at law. Against the introduction of this novelty the common law judges strenuously opposed themselves, and though ultimately defeated by the increasing power of equity, they, nevertheless, in their own courts, still adhered to the rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity (d).

Equity  
operated on  
the conscience  
of the mort-  
gagee.  
Mortgage held  
a mere pledge.

Mortgagor's  
equity to re-  
deem not-  
withstanding  
forfeiture at  
law.

Mortgages an  
exception to  
the maxim,  
*modus et con-  
ventio vincunt  
legem*.

Debtor cannot  
at time of loan  
part with his

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but a necessary decision of equity that the maxim of law, *modus et conventio vincunt legem*, was inapplicable—that the debtor could not, even by the most solemn engagements entered into *at the time of the loan*, preclude

(b) Coote, 6.

(c) Coote, 9.

(d) Coote, 10.

himself from his right to redeem. The courts, looking always at the intent, rather than at the form of things, disregarded all the defences by which the creditor surrounded himself, and laid down as a plain and invariable rule (*e*), that it was inequitable that the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs (*f*), and they established as a principle not to be departed from, that "once a mortgage always a mortgage;" that an estate could not at one time be a mortgage, and at another time cease to be so, *by one and the same deed*; and that whatever clause or covenant there might be in a conveyance, yet, if upon the whole it appeared to have been the intention of the parties that such conveyance should only be a mortgage, or should only pass an estate redeemable, a court of equity would always construe it so (*g*). These rules, however, did not prevent a mortgagee agreeing with the mortgagor, for a preference or right of pre-emption in case of a sale (*h*); and any other agreements between mortgagor and mortgagee (provided they did not exclude the equity of redemption) were and are good, *e.g.*, an agreement not to call in the principal moneys, so long as the interest is paid (*i*).

right to re-  
deem.

"Once a mortgage always a mortgage."

Right of pre-emption in mortgagee.

And the rule regarding mortgages must also be distinguished from the rule governing a class of cases where there is *ab initio* an absolute *bond fide* sale and conveyance with a collateral agreement for re-purchase by the mortgagor, on repayment of the purchase-money within a stipulated time (*j*); and such collateral agree-

Conveyance with option of re-purchase in mortgagor.

(*e*) *Bonham v. Newcomb*, 2 Vent. 364; *Howard v. Harris*, 1 Vern. 19.

(*f*) *Chambers v. Goldwin*, 9 Ves. 254; *Leith v. Irvine*, 1 My. & K. 277; *Broad v. Selfe*, 11 W. R. 1036.

(*g*) *Coote*, 11; *Jennings v. Ward*, 2 Vern. 520.

(*h*) *Orby v. Trigg*, 9 Mod. 2; *Cookson v. Cookson*, 8 Sim. 529.

(*i*) *Keene v. Biscoe*, 8 Ch. Div. 201.

(*j*) *Alderson v. White*, 2 De G. & J. 97; *Birmingham Canal Co. v. Cartwright*, 11 Ch. Div. 421.

Circumstances distinguishing a mortgage from a sale with right of re-purchase.

Effects of this distinction.

In a sale with right of re-purchase, time is strictly to be observed.

In a sale with right of re-purchase, if purchaser die seised, money goes to real representative.

ment may be either introduced into the agreement for sale at the time, or may be made at a subsequent period. Whether a given transaction is a mortgage properly so called, or is a sale with the option of re-purchase, depends on the special circumstances of each case; and parol evidence will always be admitted to show, that what appears on the face of the deed to be an absolute conveyance was intended to be a conveyance by way of mortgage only (*k*). "If the money paid by the grantee would be a grossly inadequate price for the absolute purchase of the estate; if he was not let into immediate possession of the estate; if he accounted for the rents to the grantor, and only retained an amount equivalent to interest; or if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered as evidence, showing with more or less cogency that the conveyance was only intended as a security" (*l*). And it must be remembered, that the difference between a transaction by way of sale with a right of re-purchase, and a mortgage, is very important with reference to the consequences of each. Whereas, in a mortgage, even after forfeiture at law, the mortgagor has his right of redemption in equity, in the case of a sale with a right of re-purchase, the time limited ought precisely to be observed, and there is no principle on which the court can in the latter case relieve, if the time is not exactly observed (*m*). And there is also this further important difference, viz.:—that in the case of a sale, with an option to re-purchase, if the purchaser die seised, and *then* the right to re-purchase is exercised, the money goes to his real representative, and not as in case of a mortgage to his personal representatives (*n*).

(*k*) *Maxwell v. Montacute*, Prec. Ch. 526; *Barnhart v. Greenshields*, 9 Moo. P. C. C. 18; *Douglas v. Calverwell*, 3 Giff. 251.

(*l*) Powell on Mortgages, by Coventry, 125 a.; *Brooke v. Garrod*, 3 K. & J. 608, 2 De G. & Jo. 62; *Williams v. Owen*, 5 My. & Cr. 303.

(*m*) *Barrell v. Sabine*, 1 Vern. 268.

(*n*) *Thornbrough v. Baker*, 2 L. C. 1046; *St. John v. Wareham*, cited 3 Swanst. 631.

Besides these, there are several other species of securities for money which do not take the form of an ordinary mortgage. Thus,

1. The owner of an estate may, in consideration of money lent, convey it to the lender, with a condition that as soon as he, the lender, shall have repaid himself out of the rents and profits of the land the principal and interest of the loan, the debtor may re-enter. This is said to have been called a *vivum vadium*, because as the pledge itself worked off the debt it might be deemed to possess a sort of vitality. It seems now to have entirely ceased (o).

1. *Vivum vadium*.  
Lender to pay himself from rents and profits.

2. The *mortuum vadium*, on the other hand, was of a very different character. According to Glanville (p), the *mortuum vadium* was a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which time he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the meantime, the original debt remaining undiminished by the reception by the mortgagee of the rents and profits; in other words, the pledge in this case did not of itself work off the debt, but was in a manner dead. However, there was the like advantage, in one respect, to the debtor in this form of mortgage as in the *vivum vadium*, viz., that the estate was never lost (q), but remained redeemable upon satisfaction of principal and interest at any time, however distant.

2. *Mortuum vadium*.  
Creditor took rents and profits without account.

Estate never lost.

3. This *mortuum vadium* closely resembled the form of mortgage called a Welsh mortgage, in which the rents and profits are received by the mortgagee as an equivalent for the interest, and the principal remains undiminished (r). In a Welsh mortgage there is no

3. Welsh mortgage.

Mortgagor

(o) Coote, 4.  
(q) Coote, 5.

(p) Lib. 10, c. 6.  
(r) Coote, 4.

may redeem at any time. contract express or implied between the parties for the repayment of the debt at a given time; and though the mortgagee cannot foreclose or sue for the money, the mortgagor or his heirs may redeem at any time (s).

Modern mortgage.

There is no trace of the period when the ancient *mortuum vadium* fell into disuse. In its stead arose the *mortuum vadium* of modern times or mortgage so well known at common law, which has already been described as an estate upon condition (t). In this modern form of mortgage, when the mortgagee is in possession, he is accountable in equity for the rents and profits, and by means thereof he in effect works off the debt, as in the *vivum vadium*; but differently from the *vivum vadium*, the modern mortgage may from various causes (as we shall see) become irredeemable.

The nature of an equity of redemption,—it is an estate in the land over which the mortgagor has full power, subject to the incumbrance.

In early times, it was said that an equity of redemption was a mere *right*; but in *Casborne v. Scarfe* (u), Lord Hardwicke laid it down that this equity was an estate in the land, and that the mortgagor was entitled to such estate as the real owner of the land, for the land was considered in equity only as a pledge or security for the money. It follows, therefore, that the person entitled to the equity of redemption, being considered in equity the real owner of the land, may exercise all such rights and acts of ownership over the incumbered land as he might have exercised over the unincumbered, subject, of course, to the rights of the mortgagee or incumbrancer. The mortgagor therefore might settle, or devise, or mortgage the land subject to the mortgagee's incumbrance (v).

Devolution of

And from the principle that an equity of redemption

(s) *Howell v. Price*, Prec. Ch. 423, 477; and see 1 Ves. Sr. 405.

(t) Coote, 5; Litt. sec. 332.

(v) *Casborne v. Scarfe*, 1 Atk. 603.

(u) 2 L. C. 1035; 1 Atk. 603.

is an estate, it follows also that its line of devolution must in the course of descent be governed, as the land itself would have been, by the general law, or by the *lex loci*; and therefore if the land be of gavelkind tenure, the equity of redemption will be devisable in like manner, or if the tenure be borough-English, the youngest son will be entitled (*w*).

equity of redemption same as of the land.

The equity of redemption being an estate in land, persons entitled to certain interests in that equity are entitled before foreclosure to come into a court of equity and to redeem (*x*). As,—

Who may redeem.

(*a*.) The heir (*y*).

(*b*.) The devisee of the equity of redemption (*z*).

(*c*.) A tenant for life, a remainder-man, a reversioner, a dowress, a jointress, a tenant by the curtesy (*a*).

(*d*.) An assignee or grantee (*b*).

(*e*.) A subsequent mortgagee (*c*).

(*f*.) A judgment creditor (*d*).

(*g*.) The crown, or the lord on a forfeiture (*e*).

(*h*.) A volunteer, although claiming under a deed fraudulent and void, under 27 Eliz., c. 4 (*f*).

*N.B.*—That one of several co-mortgagees can sue the mortgagor for redemption, making the other mortgagees co-defendants, when they refuse to be co-plaintiffs (*g*).

(*w*) Coote, 26; *Fawcett v. Lowther*, 2 Ves. Sr. 301.

(*x*) 2 Sp. 660-663.

(*y*) *Pym v. Bowreman*, 3 Swanst. 241 n.

(*z*) *Lewis v. Nangle*, 2 Ves. Sr. 431.

(*a*) 2 L. C. 1078.

(*b*) *Anon.* 3 Atk. 314.

(*c*) *Fell v. Brown*, 2 Bro. C. C. 278.

(*d*) *Stonehewer v. Thompson*, 2 Atk. 440; *Beckett v. Buckley*, L. R.

17 Eq. 435; *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275; *Bryant v.*

*Bull*, 10 Ch. Div. 153.

(*e*) *Lovel's Case*, 1 Eden, 210; *Downe v. Morris*, 3 Hare, 394.

(*f*) *Rand v. Cartwright*, 1 Ch. Ca. 59.

(*g*) *Luke v. South Kensington Hotel Co.*, 7 Ch. Div. 739; 11 Ch. Div.

Successive redemptions,—order of, and general principle regarding.

Every person who has a right to redeem the mortgage may redeem any prior incumbrancer on payment of principal, interest, and costs (*h*) due to him; the redeeming party being also liable to be redeemed by those below him, who are all liable successively to be redeemed by the mortgagor (*i*); and the rule or practice is in a bill or action of foreclosure to offer to redeem all incumbrances prior in date to the plaintiff, and to claim to foreclose (if necessary) all incumbrances posterior in date to the plaintiff, unless these latter, or some or one of them, should redeem the plaintiff (*j*). This rule is familiarly expressed in the phrase, "*Redeem up, foreclose down.*" The arrears of interest recoverable upon a redemption or foreclosure are usually six years only (*k*), but are occasionally the entire arrears (*l*). An auctioneer-mortgagee may be entitled to add his commission, that not being a secret profit (*m*).

Time to redeem.

A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time (*n*); and if the mortgagee should, as a matter of indulgence, consent to accept payment before the time appointed, he is entitled to the full amount of interest up to that time. So, likewise, if after the day fixed for the payment of the money is passed, the mortgagor should wish to pay off the mortgage, he must give to the mortgagee six calendar months' previous notice in writing of his intention so to do, and must then punctually pay or tender the money at the ex-

---

(*h*) *Ex parte Carr, in re Hofmann*, 11 Ch. Div. 62; *Sheffield v. Eden*, 10 Ch. Div. 291.

(*i*) 2 Sp. 665.

(*j*) *Beevor v. Luck*, L. R. 4 Eq. 537; *Bradley v. Riches*, 9 Ch. Div. 189.

(*k*) 3 & 4 Will. IV., c. 27 s. 42.

(*l*) *Smith v. Hill*, 9 Ch. Div. 143.

(*m*) *Miller v. Beal*, W. N. 1879, p. 36.

(*n*) *Brown v. Cole*, 14 Sim. 427.



piration of the notice (*o*); for if the money should not be then ready to be paid, the mortgagee will be entitled to fresh notice; as it is only reasonable that he should have time afforded him to look out for a fresh security for his money (*p*); and in either of these cases if the mortgagee should, as a matter of indulgence, consent to accept payment at less than six months' notice, he is entitled to the full amount of his interest for the six months.

Previous to the statute of Limitations, 3 & 4 Will. IV., c. 27, the rule established regarding possession by mortgagees was, as stated by Lord Hardwicke, analogous to the old statute of Limitations, 21 Jac. I., c. 19, viz., "that after twenty years' possession by the mortgagee he should not be disturbed" (*q*). Where, however, the mortgagor was prevented from asserting his claim by reason of certain impediments, mentioned as exceptions in the stat. 21 Jac. I., c. 16, viz., imprisonment, infancy, coverture, &c., in all such cases, by analogy to the statute, equity allowed ten years after the removal of the impediment (*r*). Also, any slight acknowledgment by the mortgagee, of the existence of the equity of redemption would have taken the case out of the analogy of the statute (*s*).

The law on this subject was regulated, until the 1st January 1879, by the stat. 3 & 4 Will. IV., c. 27, s. 28, as explained by 7 Will. IV. and 1 Vict., c. 28, by which it was enacted, that whenever a mortgagee had obtained possession of the land comprised in his mortgage, the mortgagor should not bring a suit to redeem the mortgage but within twenty years (with or without ten years more for disability) next after the time when the mortgagee obtained pos-

Statute of  
Limitations.  
Old law,—21  
Jac. I., c. 16.

Present law,—  
3 & 4 Will. IV.,  
c. 27, s. 28, ex-  
plained by 7  
Will. IV. and  
1 Vict., c. 28.

(*o*) *Sharpnell v. Blake*, 2 Eq. Ca. Ab. 603.

(*p*) *Wms. R. Prop.* 411.

(*q*) *Anon.* 3 Atk. 313.

(*r*) *Beckford v. Wade*, 17 Ves. 99.

(*s*) *Smart v. Hunt*, 4 Ves. 478 n.

session, or next after any *written* acknowledgment of the title of the mortgagor, or of his right or equity of redemption, should have been given to him or his agent, signed by the mortgagee (*t*); and under the Real Property Limitations Act, 1874 (*u*), s. 7, the period of twenty years is now twelve years, and the ten years allowed for disability is now six years, but otherwise the law is as it was under the previous statutes of limitation. It is to be observed that the statutes of limitation in relation to land bar and extinguish the title, and not merely the action or remedy of the dispossessed person (*v*).

Of the estate  
of the mort-  
gagor.

15 & 16 Vict.,  
c. 76.

Judicature  
Act, 1873, 36  
& 37 Vict., c.  
66, s. 25, § 5.

With whatever strictness the ancient common law may have originally regarded the breach of the condition by the mortgagor, yet in modern times the doctrine of the court of equity recognising the mortgagor until foreclosure to be the actual owner of the land, has been to some extent imported into the common law by the legislature. By stat. 15 & 16 Vict., c. 76, ss. 219, 220, if the mortgagor being in possession, an ejectment is brought by the mortgagee, provided no suit is pending in any court of equity for redemption or foreclosure, the payment of principal, interest, and costs will, except in certain cases, be deemed a satisfaction of the mortgage, and the mortgagee is thereupon to discontinue his action. And under the Judicature Act, 1873, "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents and profits, or to prevent or

(*t*) *Batchelor v. Middleton*, 6 Hare, 75; *Lucas v. Dennison*, 13 Sim. 584; *Stansfield v. Hobson*, 16 Beav. 236; *Thompson v. Bowyer*, 11 W. R. 975; *Hickman v. Upsall*, L. R. 2 Ch. Div. 617; and on appeal, 4 Ch. Div. 144.

(*u*) 37 & 38 Vict., c. 57.

(*v*) *Johnson v. Mounsey*, 11 Ch. Div. 284.

recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

A mortgagor, while he is in possession, is not bound to account for the rents and profits arising or accruing while in possession, even although the security should prove insufficient (*w*); in fact, he is not the bailiff or agent of the mortgagee.

Mortgagor in possession not accountable for rents and profits.

But, although the mortgagor remains thus, the actual owner of the land until foreclosure, still equity, regarding the land, with all its produce, as a security for the mortgage debt, will restrict the mortgagor's right of ownership within certain bounds, so that his ownership may not operate to the detriment or injury of the mortgagee. Hence equity will, on a bill filed by the mortgagee, grant an injunction against the mortgagor's waste, *e.g.*, against the felling of timber by the mortgagor; but in order to grant the injunction in such a case, the court must first be satisfied that the security is insufficient (*x*). Neither will equity interpose its authority to obstruct the mortgagee from evicting the mortgagor from the possession, but will consider the latter as being for such purpose a mere tenant at will (*y*). Occasionally the mortgagee makes a redemise of the mortgaged premises to the mortgagor; but more usually the mortgagor simply expresses that he attorns and becomes tenant to the mortgagee at a specified rent (*z*). Further, and as a further consequence of the mortgagor being for the aforesaid purpose only a tenant at will, it follows that the mortgagor

Restrained from waste if security be insufficient.

Mortgagor

(*w*) *Ex parte Wilson*, 2 Ves. & Bea. 252.

(*x*) *Farrant v. Lovell*, 3 Atk. 723; *King v. Smith*, 2 Hare, 239; *Russ v. Mills*, 7 Gr. 145.

(*y*) *Cholmondeley v. Clinton*, 2 Mer. 359.

(*z*) *Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335.

tenant at will to mortgagee. Mortgagor cannot make leases binding on mortgagee.

cannot make a valid lease binding on the mortgagee, and if he should attempt to make such a lease, the mortgagee may eject his lessee without notice (*a*). The consequence of this rule is, that in practice both mortgagor and mortgagee should combine in making the lease, wherever, at least (as in the case of mines), expense is to be incurred by the lessee, or there is a reasonable probability of the mortgagee proceeding to eviction.

Mortgagee entitled to possession.

The mortgagee, by virtue of his mortgage, becomes the legal owner of the land, and consequently entitled at law to immediate possession, or to the receipt of the rent, if the land be in lease (*b*).

Receiver of mortgaged estates.

The mortgagee is entitled, out of the profits, to repay himself all the necessary expenses attending the collection of the rents (*c*), and he may stipulate with the mortgagor for the appointment of a receiver to be paid by the mortgagor (*d*); and under the statute 23 & 24 Vict., c. 145, a power to require the appointment of a receiver is now made an incident in every mortgage of lands, unless the mortgage deed expressly exclude such power. But courts of equity, fearful of opening a door to fraud, have imposed a restriction on the mortgagee, that he shall not be permitted to make any charge on the estate for his own personal trouble (*e*); nor appoint himself a receiver of the estate, although under an express agreement with the mortgagor for that purpose (*f*), for he is entitled to no benefit beyond his principal, interest, and costs.

West India estates.

With regard to mortgagees of West India estates,

(*a*) *Keech v. Hall*, Doug. 22.

(*b*) Coote, 339.

(*c*) *Godfrey v. Watson*, 3 Atk. 518.

(*d*) *Davis v. Dendy*, 3 Mad. 170.

(*e*) *Godfrey v. Watson*, 3 Atk. 518.

(*f*) *French v. Baron*, 2 Atk. 120.

and whether they may charge commission, the result of the cases appears to be, that whilst the mortgagee is out of possession, he may stipulate for the consignment of the produce, and charge commission on the net produce as a compensation for his trouble (*g*); but that when he is in possession, he stands in precisely the same situation as a mortgagee in possession in England; and consequently, if he chooses to be consignee himself, he has no commission (*h*).

A stipulation that the mortgagee shall receive interest at £4 per cent. if regularly paid, but £5 per cent. if default is made, is good if £5 per cent. be reserved by the deed. But if £4 per cent. only is reserved, a stipulation that £5 per cent. shall be paid, if the interest be not regularly paid, is in the nature of a penalty, against which the court will relieve (*i*). So also are the fines and penal payments contained in mortgages to building societies, *semble* (*j*). *Sed quære*.

Stipulation for lower rate of interest on punctual payment.

Fines in Building Society mortgages.

It is the duty of the mortgagee in possession to keep the premises in necessary repair. He will be entitled to all his lawful expenses attending the renewal of leases, or incurred in maintaining the title (*k*). But a mortgagee is not bound to lay out money on the estate, except for necessary repairs, and that only to the amount of the surplus rents (*l*), nor can he, on the other hand, compel the mortgagor to advance money for the renewal of the leases without an express agreement between them to that effect (*k*).

Mortgagee must keep estate in necessary repair with surplus rents.

(*g*) *Faulkner v. Daniel*, 3 Hare, 218.

(*h*) *Leith v. Irvine*, 1 My. & K. 277; Coote, 343.

(*i*) 2 Sp. 631; *Tipton Green Colliery Co. v. Tipton Moat Colliery Co.*, L. R. 7 Ch. Div. 192.

(*j*) *Ex parte Osborne, in re Goldsmith*, L. R., 10 Ch. App. 41; *In re N. and N. P. Benefit Building Society, Smith's Case*, L. R. 1 Ch. Div. 481; but see *Provident Permanent Building Society v. Greenhill*, 9 Ch. Div. 122.

(*k*) *Manlove v. Bale*, 2 Vernon, 87; *Godfrey v. Watson*, 3 Atk. 518.

(*l*) Coote, 344.

Mortgagee in possession must account.

Even though he has assigned the mortgage.

When the mortgagee is in possession, he is considered in equity, in some measure, in the light of a trustee, or bailiff, for the mortgagor, and is accountable for the rents and profits of the land; and therefore, if *without the assent of the mortgagor* he assigns over the mortgage to another, he will be held liable to account for the profits received *subsequently* even to the assignment, on the principle that having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate (*m*). The consequence of this rule of equity is, that the mortgagor is usually asked, and may easily be compelled, to concur in the assignment.

Mortgagee is accountable for what he actually receives, or what but for his wilful default he might have received.

But although the mortgagee is liable to account, he is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much, unless it can be proved that he made so much out of it, or might have done so but for his own wilful default, as if without cause he turned out a sufficient tenant who held it at so much rent, or refused to accept a tenant who would have given so much for it (*n*). This limited protection accorded to the mortgagee is so accorded to him, because it is the laches of the mortgagor, that he lets the land lapse into the hands of the mortgagee by the non-payment of the money; therefore, except as above-mentioned, when the mortgagee enters, he is only accountable for what he actually receives, and is not bound to take the trouble of making the most of another's property (*o*) and above all the mortgagee is not bound to work or to keep working, at a speculative profit, the minerals in the land mortgaged (*p*). The same rule, limiting the

---

(*m*) Coote, 303; *National Bank of A. v. United Hand in Hand Co.*, 4 App. Ca., 391.

(*n*) Coote, 345; *Anon.* 1 Vern. 45; *Simmins v. Shirley*, L. R. 6 Ch. Div. 173; *Eyre v. Hughes*, L. R. 2 Ch. Div. 148.

(*o*) Coote, 345.

(*p*) *Rowe v. Wood*, 1 Jac. & Walk. 315.

accountability of a mortgagee in possession, applies to the mortgagee selling under his power of sale (*q*).

The mortgagee, without payment of principal, interest, and costs, cannot be compelled by the mortgagor or his assigns to produce the title-deeds, even though their production is required for the purpose of enabling the mortgagor to negotiate a loan, and so to pay off the mortgagee (*r*). But upon redemption, the mortgagee must be in a position to hand over all the title-deeds, and will be liable in damages to the mortgagor for any title-deed that is missing, or fraudulently disposed of (*s*).

Mortgagee until payment cannot be compelled to produce his title-deeds.

It seems that a mortgagee cannot accept a valid lease from the mortgagor, even, it appears, though free from circumstances of fraud, and at a fair rent. The reason for this disability has been thus stated:—"The mortgagor is under the control of the mortgagee in the very subject-matter of the contract, and if the mortgagee had distinctly said to the mortgagor, 'You must let to me a lease for ninety-nine years, at the rent which I think fit to give, and if you will not, I will harass you by all the means by which a mortgagee can harass a debtor;' it is plain a lease so obtained could not stand. If the same thing can be done without a word spoken, the same consequences ought to follow. Ought evidence of such a conversation to be required? Is it not better to hold, as in the case of a trustee, 'because this may be done, it shall be taken as done, and the act, if disputed, shall be invalid'" (*t*).

Mortgagee cannot take a valid lease from mortgagor.

A further considerable disability annexed to the Mortgagee

(*q*) *Mayer v. Murray*, 8 Ch. Div. 424.

(*r*) *Damer v. Lord Portarlington*, 15 Sim. 380; and see *Sheffield v. Eden*, 10 Ch. Div. 291.

(*s*) *James v. Rumsey*, 11 Ch. Div. 398.

(*t*) *Webb v. Rorke*, 2 Sch. & Lef. 661; Coote, 364.

cannot in equity make a binding lease.,

mortgagee's estate is, that although he is at law the actual owner, and consequently can make and is the only person to make a good legal title, yet he cannot in equity make a valid or binding lease, unless, it seems, it is of necessity, and to avoid a probable loss (*u*). The consequence of this rule is, that both the mortgagor and the mortgagee concur in making leases, wherever permanency of holding is desirable.

Renewed leaseholds.

Equity holds that if leaseholds be in mortgage, and the mortgagee renew, he will take the renewed lease subject to the like equity, as was subsisting in the old lease (*v*); and if an advowson be in mortgage, and the living become vacant, the mortgagor, and not the mortgagee, shall present (*w*); nor will equity permit the mortgagor to agree to the contrary, for the mortgagee shall have no benefit beyond his principal, interest, and costs.

Advowson.

Mortgagee cannot fell timber.

A further restriction on the estate of the mortgagee in possession is, that he shall not be permitted to waste the estate (*x*). If he proceed to fell timber, an account will be decreed, and the produce applied, first, in payment of the interest, and then, in sinking the principal, and equity will grant an injunction against him, unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being of course applied in ease of the estate (*y*). The like rules apply to the opening of new mines (*z*). So, if the mortgagee unnecessarily pulls down buildings and erects new buildings without the consent of the

Unless security be insufficient.

(*u*) *Hungerford v. Clay*, 9 Mod. 1.

(*v*) *Holt v. Holt*, 1 Ch. Ca. 190.

(*w*) *Mackenzie v. Robinson*, 3 Atk. 559.

(*x*) *Hanson v. Derby*, 2 Vern. 392.

(*y*) *Withrington v. Bankes*, Sel. Ch. Ca. 30.

(*z*) *Hanson v. Derby*, 2 Vern. 392; *Millet v. Davey*, 31 Beav. 470.



mortgagor, he is liable for any loss of rent which is thereby occasioned (a).

---

With reference to the rights of mesne, or intermediate incumbrancers, the doctrine of tacking has been thus stated: "*In aequali jure, melior est conditio possidentis*. Where equity is equal, the law shall prevail; and he that hath only a title in equity, shall not prevail against law and equity. As a purchaser or mortgagee comes in upon a valuable consideration without notice, upon purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, and before the last mortgage, though he purchased in the first incumbrance, after he had notice of the second mortgage; for he hath both law and equity" (b). In considering this rule of equity, Lord Hardwicke has remarked (c), that it could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore, where there is a legal title and there is also equity on one side, the Court of Chancery never thought fit, that by reason of a prior equity against a man who has a legal title, that man shall be hurt, and this, by reason of the force which the court necessarily and rightly allows to the common law, and to legal titles; but if this had happened in any other country, it could never have been made a question; for if the law and equity are administered by the same jurisdic-

The doctrine of tacking,—its principle.

Doctrine of tacking,—its origin.

---

(a) *Sandon v. Hooper*, 6 Beav. 246; 14 L. J. Ch. 120.

(b) 2 Fonblanque on Eq. 302, 5th ed.

(c) *Wortley v. Birkhead*, 2 Ves. Sr. 574.

tion, the rule *qui prior est tempore, potior est jure*, must hold (d). However, since the fusion of the two jurisdictions of law and equity by the Judicature Acts, 1873-75, the cause alleged by Lord Hardwicke for the origin of tacking has been removed, and yet the doctrine itself continues unaffected: which shows, either that the assigned origin is not the origin, or not *all* the origin, or else that results may survive the causes which have brought them about.

The doctrine of tacking,—its rules.

The leading principles or rules of the doctrine of tacking are fully stated in the case of *Brace v. Duchess of Marlborough* (e).

1. Third mortgagee without notice of second, buying in first mortgage with notice of second, may tack.

1. "That if a third mortgagee buys in the first mortgage, being a legal mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall squeeze out the second mortgagee, and this, the Lord Chief-Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*."

Because he is without notice, when he parts with his first cash.

In this case it must carefully be noted that although the third mortgagee get in the first mortgage, *pendente lite*, i.e., *with notice*, he shall, nevertheless, be allowed to tack. The principle on which the doctrine is founded is thus explained (f):—"The rule of equity requires no more than that *the third mortgagee should not have had notice of the second at the time of lending the money; for it is by lending the money without notice that he becomes*

(d) *Rooper v. Harrison*, 2 K. & J. 108, 109.

(e) 2 P. W. 491; and see (regarding the rule in *Toulmin v. Steere*, 3 Mer. 210) *Adams v. Angell*, L. R. 5 Ch. Div. 634; *Cracknall v. Janson*, L. R. 6 Ch. Div. 735.

(f) 1 *Eden*. 530.

*an honest creditor, and acquires the right to protect his debt.* But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and, therefore, when that danger is discovered to him, whether it be by suit in equity, or by an extra-judicial means, as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced; hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*" (g). Although if the legal estate be outstanding in a third person who has no privity with the several incumbrancers, the party obtaining it would have priority, yet where the legal owner is *trustee for all*, he cannot create a priority by subsequently transferring the estate to any or either of them in particular. Thus, if an owner having the legal estate, create a charge in favour of A., then a second charge in favour of B., and then a third in favour of C., he cannot alter the equities by transferring the legal estate to any of them (h).

And may therefore protect his honest debt, against subsequently discovered dangers.

By transfer of legal estate, if outstanding in person having no privity with prior incumbrancers.

2. That if a judgment-creditor buys in the first mortgage, although being a legal mortgage, he shall not tack or unite the mortgage to his judgment, and thereby gain a preference; for such judgment-creditor cannot be called a purchaser, nor has he any right to the land; he has neither *jus in re* nor *jus ad rem*. All that he has by his judgment is a lien on (i) or inchoate right against the land, but *non constat*, whether he will ever make use of it, for he may take his debt out of the goods of his debtor by *fieri facias*, [or he may take his body, after which, during the defendant's life, he can

2. Judgment-creditor buying in the first mortgage shall not tack.

Judgment-creditor not a purchaser.

(g) *Marsh v. Lee*, 1 L. C. 659; *Morret v. Paske*, 2 Atk. 52; *Wilmot v. Pike*, 5 Hare, 14.

(h) *Sharples v. Adams*, 11 W. R. 450; 32 Beav. 213; *Mumford v. Stohwasser*, L. R. 18 Eq. 556. *Pilcher v. Rawlins*, L. R. 7 Ch. App. 259, is distinguishable.

(i) But see now 27 & 28 Vict., c. 112.

He did not lend his money in contemplation of the land.

or could (before the Judicature Acts, 1873-75) have no other execution]; besides which, *the judgment-creditor does not lend his money on the immediate view or contemplation of the land*, nor is he deceived or defrauded, though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived, if the mortgagor has already mortgaged his land to another (*j*).

Law unaltered by 1 & 2 Vict., c. 110.

Judgment can only affect what the debtor had, to part with.

It would seem from the principles laid down in the judgment in *Whitworth v. Gaugain* (*k*), that the law in this respect has not been altered by the 1 & 2 Vict., c. 110; for if the effect of the judgment is only to charge the interest which the debtor has remaining in him, the creditor can have no right, by means of tacking, to cut off an incumbrance which preceded his judgment (*l*).

Law how far altered by 27 & 28 Vict., c. 112.

But as by 27 & 28 Vict., c. 112, s. 2, judgment-creditors are for the future deprived of their lien on real estates, until such land has been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, it appears that a judgment-debt cannot now be tacked, unless such delivery has been made.

3. First mortgagee lending a further sum on a judgment may tack against a mesne mortgagee.

3. That if a first mortgagee being a legal mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, until both his securities are satisfied (*m*); and *a fortiori* if the first mortgagee lends on a mortgage (*n*).

(*j*) *Lacey v. Ingle*, 2 Ph. 413; *Spencer v. Pearson*, 24 Beav. 266.

(*k*) 3 Hare, 416; and see *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. App. 567.

(*l*) Coote, 409; *Kinderley v. Jervis*, 22 Beav. 1; *Beavan v. Lord Oxford*, 6 De G. M. & G. 507.

(*m*) *Shepherd v. Titley*, 2 Atk. 348.

(*n*) *Wyllie v. Pollen*, 11 W. R. 1081.

This rule results from the doctrine already noticed, that where equity is equal, the law shall prevail. But this principle will not apply unless the first mortgagee *has the legal estate or the better right to call for it*; for otherwise the incumbrancers will be payable according to the priority of their respective incumbrances; nor will the rule apply if the mortgagee had notice of the mesne incumbrance, at the time of making the further advance (o).

But first mortgagee must have the legal estate or the better right to call for it.

And must make the advance without notice.

And it has further been decided, that although the first mortgage was made to secure a sum and *further advances*, if the first mortgagee make a further advance with notice of a mesne incumbrance, he will not be entitled to priority in respect of such further advance (p).

First mortgagee must not have notice of the mesne incumbrance.

4. When a puisne mortgagee has bought in a prior incumbrance, but the legal estate is vested in a trustee, or the puisne mortgagee has not obtained the legal title, or he takes *en autre droit* (q), the court clearly holds that the puisne mortgagee can make no advantage of his prior incumbrance, because in all cases where the legal estate is outstanding, the several incumbrancers must be paid according to their priorities in point of time,—*qui prior est tempore, potior est jure*.

4. Where legal estate is outstanding, incumbrancers rank according to time.

But if any one of the incumbrancers has a better title to call for an assignment or conveyance of the legal estate, as, for instance, when a declaration of trust of the legal estate has been made in his favour, he will be placed in equity, in the same situation as if he had obtained an actual assignment (r).

Unless one of the incumbrancers has a better title to call for the legal estate.

(o) Coote on Mortgages, 409; see *Credland v. Potter*, L. R. 10 Ch. App. 8.

(p) *Shaw v. Neale*, 20 Beav. 157; *Rolt v. Hopkinson*, 9 H. L. Cas. 514. These two cases appear to have overruled *Gordon v. Graham*, 2 Eq. Ca. Abr. 598.

(q) *Morret v. Paske*, 2 Atk. 52.

(r) *Pomfret v. Windsor*, 2 Ves. Sr. 487; *Allen v. Knight*, 5 Hare, 272; *Wilmot v. Pike*, 5 Hare, 14; *Cooke v. Wilton*, 29 Beav. 100.

When a bond debt may be tacked,—  
 (a.) During life of debtor, —never.  
 (b.) After death of debtor,—only as against volunteers.

It appears that a prior mortgagee having a bond debt, whether prior or subsequent to his mortgage (s), cannot tack it against any intervening incumbrancer by mortgage, or even against an intervening judgment or bond creditor (t), or even against the mortgagor himself (u), or as against a purchaser of the equity of redemption; but only as against the heir (v), or as against the beneficial devisee (w); and this for the sole purpose of preventing circuitry of action (x). And since 3 & 4 Will. IV., c. 104, it seems a simple contract debt may be tacked against the heir or devisee where there is not a devise for payment of debts (y). In other words, the bond debt cannot be tacked at all during the life of the mortgagor, but only after his death upon an administration of his assets, when of course it will be preferred to the heir or beneficial devisee (z).

Tacking abolished by Vendor and Purchaser Act, 1874, and restored by Land Transfer Act, 1875.

By 37 & 38 Vict., c. 78, s. 7, the doctrine of tacking was abolished as regard estates and interests created after the 7th August 1874; but by the Land Transfer Act, 1875 (a), which came into operation on the 1st January 1876, it is enacted as follows:—"The seventh section of the Vendor and Purchaser Act, 1874, is hereby repealed, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this Act."

Priority may be lost by mortgagee's fraud.

The right of priority may be lost by fraud. "If a man by the suppression of the truth which he was

(s) *Windham v. Jennings*, 2 Ch. Rep. 247.

(t) *Lowthian v. Hasel*, 3 Bro. C. C. 162.

(u) *Jones v. Smith*, 2 Ves. 376.

(v) *Shuttleworth v. Laycock*, 1 Vern. 245.

(w) *Challis v. Casborn*, 1 Eq. Ca. Ab. 325; *Du Vigier v. Lee*, 2 Hare, 326.

(x) *Heams v. Bance*, 3 Atk. 630; Coote, 391-393.

(y) Coote, 402; Sp. 723-725, 735.

(z) *In re Haselfoot's Estate*, *Charntler's claim*, L. R. 13 Eq. 327.

(a) 38 & 39 Vict., c. 87.

bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation" (b).

A mortgagee may also lose his priority by his own negligence. Thus A., a mortgagee of leasehold property, lent the lease to the mortgagor for the purpose of obtaining a further advance upon it, but at the same time told the mortgagor to inform the person, of whom he proposed to obtain the money, that A. had a prior charge. The mortgagor deposited the lease with his bankers without informing them of A.'s mortgage. On a bill for foreclosure by A., it was held that, as A. by his negligence had put it into the mortgagor's power to commit a fraud, his security must be postponed to that of the banker's (c).

Priority may be lost by mortgagee's negligence inducing deception.

As a general rule, both in suits for foreclosure and in suits for redemption, the mortgagor cannot redeem one mortgage without redeeming all other mortgages which the mortgagee holds upon any part of his property; for these the mortgagee has a right to consolidate together (d). And this rule is applicable as well to mortgages of realty (e) as to mortgages of personalty (f), and holds good against a purchaser for value of the equity of redemption, and also against a subse-

Consolidation of mortgages. Mortgagor must redeem all the mortgages which the mortgagee holds on his property.

(b) 1 Fonblanque on Eq. 64; Coote, 415.

(c) *Briggs v. Jones*, L. R. 10 Eq. 92; and see *Credland v. Potter*, L. R. 10 Ch. App. 8.

(d) *Selby v. Pomfret*, 1 J. & H. 336; 9 W. R. 583; *Phillips v. Gutteridge*, 4 De G. & Jo. 531; *Tassell v. Smith*, 2 De G. & Jo. 713-718.

(e) *Neve v. Pennell*, 11 W. R. 986.

(f) *Watts v. Symes*, 1 De G. M. & G. 240; *Tweeddale v. Tweeddale*, 23 Beav. 341.

quent mortgagee thereof, although each is without notice of the other mortgages (g).

Consolidation distinguished from tacking,

The doctrine of consolidation depends upon a principle altogether different from that upon which tacking depends. Because in tacking, the right is to throw together several debts lent on the *same* estate, and to do so under the priority and protection afforded by the legal estate; but in consolidation, the right is to throw together on one estate several debts lent on *different* estates, and to do so *without reference to any priority or protection afforded by the legal estate*, but solely upon the equitable maxim that he who seeks equity must do equity. Further, not only is getting in the legal estate not necessary as a preliminary to consolidation as it is to tacking, but even *notice* at the time of lending the mortgage money on the second estate, which would be fatal to any subsequent right of tacking, is wholly immaterial as regards the right of consolidation (h). *Sed quære*; because,—

Consolidation, —necessary limit to.

To the doctrine of consolidation, the recent case of *Baker v. Gray* (i) has put a very desirable limit. Hall, V.-C., after looking personally into all the previous cases, stated, in effect, in his judgment in that case, that “there had been no case decided on the principle of consolidation in favour of a mortgagee *whose mortgage was non-existing at the time* when the second mortgage (or, *semble*, subsequent purchase) was made. . . . The principle had been rested by Wood, V.-C., upon the capacity of the party to make the inquiry; but such an inquiry was impossible into what was non-existing.”

---

(g) *Bevor v. Luck*, L. R. 4 Eq. 537—explained in *Baker v. Gray*, L. R. 1 Ch. Div. 491.

(h) Fisher on Mortgages, 2d ed. pp. 678, 679.

(i) L. R. 1 Ch. Div. 491; *Cracknell v. Janson*, 11 Ch. Div. 1; but see an unreported case of *Hill v. Astley*, Lanc. Ch. Crt. 1878 (Little, V.-C.).



*N.B.*—A solicitor may be held liable for negligence in not discovering a mesne incumbrance; and the measure of damages might be the amount of the incumbrance (*j*).

Equity having determined that the mortgage debt shall be considered the principal, and the land a pledge, and as a consequence that the mortgagor, notwithstanding his breach of condition and the consequent forfeiture at law of his estate, shall be relievable in equity on payment of principal, interest, and costs, and that the mortgagee in possession was accountable for the rents and profits; it became, on the other hand, just, that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or, in other words, be foreclosed his right of redemption.

Special remedies of mortgagee,—  
(a.) Foreclosure.

An intermediate mortgagee is entitled to file a bill or commence an action of foreclosure against the mortgagor, and all mortgagees subsequent to himself (*k*); and in his action he usually offers to redeem any mortgagees prior to himself whom he makes parties to the action. When the mortgagor is a bankrupt, this remedy may occasionally, at the mortgagee's option, be obtained in the Court of Bankruptcy under s. 72 of the Bankruptcy Act, 1869, but the mortgagee cannot be restrained if he chooses to proceed in the Chancery Division (*l*). A foreclosure action cannot be brought but within twenty years next after the right to bring such action first accrued, or within twenty years after the last payment of any part of the

Foreclosure action—nature of, and time for.

(*j*) *Whiteman v. Hawkins*, 4 C. P. Div. 13.

(*k*) 2 Sp. 674.

(*l*) *Ex parte Fletcher*, in *re Hart*, 9 Ch. Div. 381; 10 Ch. Div. 610; *Ex parte Hirst*, in *re Wherley*, 11 Ch. Div. 278.

principal money or interest (*m*); and only six years' arrears of interest are recoverable as against the land (*n*). The remedy of a debenture-holder is usually the appointment of a receiver (*o*).

(b.) Sale,—  
either,  
(1) Under 15 &  
16 Vict., c. 86,  
by order of the  
court.

Before the stat. 15 & 16 Vict., c. 86, courts of equity, except in a few cases, refused to decree a sale against the will of the mortgagor; but under that statute, s. 48, the Court of Chancery may direct a sale of mortgaged property instead of a foreclosure, on such terms as it may think fit. This order for a sale is not to be made on an interlocutory application (*p*).

Or (2) under  
power of sale  
in the mort-  
gage-deed.

A power of sale, even before that Act, was usually inserted in mortgage-deeds, giving the mortgagee authority to sell the premises; but such a power was only permitted where the mortgaged land did not exceed in value the money lent; for if the security were very ample, it was not likely that the mortgagor would consent to such a power being given to the mortgagee, in case default should be made in payment; and the concurrence of the mortgagor in the sale is not necessary to perfect the title of the purchaser (*q*). The mortgagee having sold, is at liberty to retain to himself principal, interest, and costs; and having done this, the surplus, if any, must be paid over to the person or persons who (but for the sale) would have been entitled to redeem.

Or (3) under

Also, under the stat. 23 & 24 Vict., c. 145, s. 11,

(*m*) 3 & 4 Will. IV., c. 27, ss. 24, 28; 7 & 8 Will. IV. & 1 Vict., c. 28; Coote, 449. And see the Real Property Limitation Act, 1874.

(*n*) *In re Stead's Mortgaged Estates*, L. R. 2 Ch. Div. 713; and see *Hickman v. Upsall*, L. R. 2 Ch. Div. 617, and, on appeal, 4 Ch. Div. 144.

(*o*) *In re Herne Bay Co.*, 10 Ch. Div. 43.

(*p*) *London and County Banking Co. v. Dover*, 11 Ch. Div. 204.

(*q*) *Corder v. Morgan*, 18 Ves. 344; *Newman v. Selfe*, 33 Beav. 522; *Dicker v. Angerstein*, L. R. 3 Ch. Div. 600.

a power of sale, unless expressly excluded by the mortgage-deed, has been rendered incident to every mortgage or charge by deed affecting any hereditaments of any tenure. This power, however, is not to arise until either after one year from the time when the principal money shall have become payable according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the mortgaged property. And no sale is to be made until after six months' notice in writing. Where mortgaged property is taken by compulsory purchase, the compensation-moneys go to mortgagee, including proportion paid for goodwill (if any) attaching to the premises (r).

statutory  
power of sale  
conferred by  
23 & 24 Vict.,  
c. 145.  
  
Compensation,  
—on compulsory  
purchase.

Where the mortgage deed contains an attornment clause, the mortgagee may also (like a landlord for his rent) distrain upon the mortgaged premises (the distrainable articles therein) for the arrears of his interest, and sometimes even for a large part of the principal money lent, provided the attornment clause is not fraudulent (s).

If a debt be secured by the mortgage of real estate, and also collaterally by covenant or by bond, the mortgagee may pursue all his remedies at the same time (t). If the mortgagee obtain full payment on the bond or covenant, the mortgagor is by the fact of payment entitled to a re-conveyance of the estate, and foreclosure is rendered unnecessary. But if the mortgagee obtains only part payment on the bond or on the

Mortgagee  
may pursue  
all his remedies  
concurrently.

---

(r) *Pile v. Pile*, *ex parte Lambton*, L. R. 3 Ch. Div. 36.

(s) *Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335.

(t) *Lockhart v. Hardy*, 9 Beav. 349; *Marshall v. Shrewsbury*, L. R. 10 Ch. App. 250.

If mortgagee foreclose first, and then sue on the covenant, he opens the foreclosure, and mortgagor may redeem.

Mortgagee must therefore have the estate in his power.

covenant, he may institute or go on with his foreclosure action, and giving credit in account for what he has received on the bond or covenant, he may foreclose for nonpayment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant; but it is held, that by doing so he gives to the mortgagor a renewed right to redeem the estate, and get it back, or, in other words, he thereby opens the foreclosure, and consequently upon the commencement of an action against the mortgagor on the bond after foreclosure, the mortgagor may commence an action, or even, *semble*, counter-claim, for redemption, and upon payment of the whole debt secured by the mortgage, he is entitled to have the estate back again, and the securities given up. After foreclosure, therefore, the court will not restrain the mortgagee from suing on the bond, *provided he retains the mortgaged estate in his power*, ready to be redeemed in case the mortgagor should think fit to avail himself of the foreclosure (*u*); but if on the other hand the mortgagee has so dealt with the mortgaged estate as to be unable to restore it to the mortgagor on full payment (*v*), the court will prevent his suing at law on the bond or covenant to receive the residue of the mortgage-money (*w*). A foreclosure decree is almost always liable to be opened, even after a long interval of time and intermediate dealings with the property; in other words, a mortgagor may redeem even after foreclosure absolute, but only upon terms of the strictest equity (*x*).

The equity of

There is a class of cases in which the question has

---

(*u*) 2 Sp. 682.

(*v*) *Lockhart v. Hardy*, 9 Beav. 349.

(*w*) *Palmer v. Hendrie*, 27 Beav. 349.

(*x*) *Campbell v. Holyland*, L. R. 7 Ch. Div. 166.

been, whether it is intended by the parties making the mortgage that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses. These questions have generally arisen in mortgages by husband and wife of the wife's estate; and the principle of equity in such cases is, that if money be borrowed by the husband and wife upon the security of the wife's estate, although the equity of redemption is by the mortgage deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be a *resulting* trust for the benefit of the wife and her heirs, and that the wife or her heir shall redeem, and not the heir of the husband, her estate being in equity deemed only a security for his debt (y). But at the same time, the intention to alter the previous title may be manifested by the language of the proviso itself, and there is no necessity for an express declaration or recital to that effect (z).

redemption follows the limitations of the original estate.

Mortgage by husband of his wife's estate.

Equity of redemption results to wife.

Unless a different intention manifested.

---

(y) *Huntingdon v. Huntingdon*, 2 L. C. 1032; *Jackson v. Parker*, Amb. 687; *Jackson v. Innes*, 1 Bligh, 104; *Whitbread v. Smith*, 3 De G. M. & G. 727; Coote, 523; and distinguish the case of *Dawson v. Bank of Whitehaven*, L. R. 6 Ch. Div. 218, which was a case of husband and wife mortgaging the husband's estate, the wife being a concurring party in order to release her dower therein.

(z) *Atkinson v. Smith*, 3 De G. & Jo. 186-192; *Jones v. Davies*, L. R. 8 Ch. Div. 205.

## CHAPTER XVII.

OF EQUITABLE MORTGAGES OF REALTY BY DEPOSIT  
OF TITLE-DEEDS.

Statute of  
Frauds re-  
quires con-  
tracts con-  
cerning lands  
to be in  
writing.

Deposit of  
title-deeds,  
being an  
agreement  
executed, is  
not within  
the statute.

THE Statute of Frauds (*a*) enacts that "no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Notwithstanding this statute, it is now decided (*b*) that if the title-deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of his creditor, or of some third person on his behalf (*c*), such deposit is of itself evidence of an agreement executed for a mortgage of the estate (*d*), of which agreement the creditor may avail himself as of an agreement in writing for that purpose; for he may file his bill for the completion of the security by a legal conveyance from his debtor, who will not be allowed to plead the Statute of Frauds (*e*). It appears to be now finally settled that a mortgagee by

---

(*a*) 29 Car. II., c. 3, s. 4.

(*b*) *Russel v. Russel*, 1 L. C. 726.

(*c*) *Ex parte Coming*, 9 Ves. 115.

(*d*) *Ex parte Wright*, 19 Ves. 258.

(*e*) *Pryce v. Bury*, 2 Drew. 42; *Ferris v. Mullins*, 2 Sm. & Giff. 378; *Ex parte Moss*, 3 De G. & Sm. 599.

deposit is entitled to the remedy by foreclosure (*f*); but, of course, he is also entitled to a sale (*g*).

In *Keys v. Williams* (*h*), Lord Abinger said,—“The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds. . . . But in my opinion that statute was never meant to affect the transaction of a man borrowing money and depositing his title-deeds as a pledge of payment. A court of law could not assist such a party to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money, and that till the money is repaid, the party has no right to them. So, if the party came into equity for relief, he would be told that before he sought equity he must do equity, by repaying the money, in consideration for which the deeds had been lodged in the other party's hands.”

In *Russel v. Russel* (*i*) it was decided that the deeds were a security for the sum advanced at the time of the deposit, and only for that sum. But this rule has been extended, and it is now held that such a deposit will cover future advances, if such was the agreement when the first advance was made; or if it can be proved that a subsequent advance was made on an agreement, express or implied, that the deeds were to be a security for it as well (*j*). An equitable mortgage by deposit carries interest at the rate of £4 per cent (*k*).

Origin of the doctrine.

Deposit of deeds covers further advances,

and interest.

---

(*f*) *Pryce v. Bury*, L. R. 16 Eq. 153 n.; *James v. James*, *ibid.*; and see *Marshall v. Shrewsbury*, L. R. 10 Ch. App. 250; *Backhouse v. Charlton*, 8 Ch. Div. 444.

(*g*) *York Union Banking Co. v. Astley*, 11 Ch. Div. 205.

(*h*) 3 Y. & C. Exch. Ca. 55, 61.

(*i*) 1 L. C. 726.

(*j*) *Ex parte Kensington*, 2 V. & B. 83; *Ede v. Knowles*, 2 Y. & C. C. C. 172; *James v. Rice*, 5 De G. M. & G. 461.

(*k*) *Re Kerr's Policy*, L. R. 8 Eq. 331.

Deposit of deeds for purpose of preparing a legal mortgage.

Where there has been a deposit of title-deeds for the purpose of preparing a legal mortgage, the balance of authority seems to be in favour of the proposition that a delivery of deeds for the purpose of preparing a legal mortgage constitutes, in fact, a valid interim equitable mortgage (*l*),—that interim effect being not inconsistent with the expressed purpose of the deposit of title-deeds.

Parol agreement to deposit deeds for money advanced.

A parol agreement to deposit title-deeds for a sum of money advanced does not without an actual deposit constitute a good equitable mortgage (*m*); but if in writing, such an agreement would be good, without an actual deposit.

All title-deeds need not be deposited.

It is now clearly decided that in order to create an equitable mortgage it is not necessary that all the title-deeds, or even all the material title-deeds, should be deposited; it is sufficient if the deeds deposited are material to the title, and are proved to have been deposited with the intention of creating a mortgage (*n*).

Deposit of Land Certificate.

Where land has been registered with an indefeasible title, the land certificate (and not the title-deeds) is the proper document to deposit (*o*).

Equitable mortgagee parting with the title-deeds to mortgagor.

An equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be postponed to such second equitable mortgagee by reason of his laches, in not getting back the deed — on the principle that, as be-

(*l*) 1 L. C. 733.

(*m*) *Ex parte Coombe*, 4 Mad. 249; *Ex parte Farley*, 1 M. D. & De G. 683.

(*n*) *Lacon v. Allen*, 3 Drew. 579; *Roberts v. Croft*, 24 Beav. 223; 2 De G. & Jo. 1.

(*o*) Fisher on Mortgages, 2d ed., pp. 41, 42.



tween two innocent parties, the one must suffer who has permitted the fraud to be committed (*p*).

An equitable mortgagee by deposit of title-deeds will be entitled to priority over a subsequent legal mortgagee who advanced his money *with notice* of the deposit (*q*). And constructive notice will suffice for this purpose; but mere incaution will not prevent the legal mortgagee from asserting his priority over the prior equitable mortgagee. The principles which govern this class of cases are thus summarised by Turner, V.-C., in *Hewitt v. Loosemore* (*r*),—"That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud or gross and wilful negligence on his part; that the court will not impute fraud, or gross or wilful negligence, to the mortgagee, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the court will impute fraud, or gross and wilful negligence, to the mortgagee, if he omits all inquiry as to the deeds; and I think there is much principle both in the rule itself and in the distinctions upon it. When this court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right; and I see no ground which can justify it in doing so, except fraud, or gross and wilful negligence, which, in the eye of this court, amounts to fraud; and I think that in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds which constitute the sole evidence of the title to such property, the court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry from a suspicion that his title would be affected if it was

Equitable mortgagee has priority to subsequent legal mortgagee, with notice. Legal mortgagee postponed to prior equitable mortgagee, if former has been guilty of fraud or gross negligence. Not postponed if he has made *bonâ fide* inquiry after the deeds.

Gross and wilful negligence tantamount to fraud.

Absence of inquiry after deeds, presumptive evidence of fraud.

(*p*) *Waldron v. Sloper*, 1 Drew. 193.

(*q*) *Hiern v. Mill*, 13 Ves. 114; *Jones v. Williams*, 5 W. R. 540.

(*r*) 9 Hare, 458.

made, and is, therefore, bound to impute to him the knowledge which the inquiry if made would have imparted. But I think, if a *bonâ fide* inquiry is made, and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it; but the person who accepts the excuse will afterwards have the burden of showing that it was a reasonable one for any prudent lender of money to accept" (s).

---

(s) *Spencer v. Clarke*, 9 Ch. Div. 137.

## CHAPTER XVIII.

## OF MORTGAGES AND PLEDGES OF PERSONALTY.

A MORTGAGE of personal property differs from a pledge. The mortgage is a conditional transfer or conveyance of the very property itself, the interim possession usually remaining with the mortgagor; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. A pledge, on the other hand, passes the possession immediately to the pledgee, who acquires at the same time a special property only in the article pledged, with a right of retaining same until the debt is discharged (a).

Differences between a mortgage and a pledge of personalty, (a.) In their own nature.

In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time. But if no time is fixed for the payment, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee; and in case of the death of the pledgor without such demand, his personal representatives may redeem (b).

(b.) As regards remedies.

Generally speaking, the remedy of the pledgor or his representatives is at law. But if any special ground is shown, as if an account or discovery is wanted, or there has been an assignment of the pledge, a bill will lie in equity (c).

Remedy of a pledgor, as a general rule, is at law, and only exceptionally in equity.

(a) St. 1030; *Jones v. Smith*, 2 Ves. Jr. 378.

(b) *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Kemp v. Westbrook* 1 Ves. Sr. 278.

(c) *Jones v. Smith*, 2 Ves. Jr. 372.

Remedy of a pledgee, as a general rule, is in equity; but pledgee may also sell, on notice to pledgor.

On the other hand, the pledgee may bring a bill in equity, to sell the pledge (*d*). It seems, also, that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale (*e*).

Differences between a mortgage of realty and a mortgage or pledge of personalty,

(*a.*) As regards remedies.

In mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his bill to redeem, within a reasonable time (*f*). There is, however, a difference between mortgages of land, on the one hand, and mortgages and pledges of personal property on the other, in regard to the rights of the parties after a breach of the condition. In such a case, there is no necessity in mortgages of personalty or in pledges (as there usually is in mortgages of realty) to bring a bill of foreclosure; but the mortgagee or pledgee, upon due notice, may sell the personal property mortgaged or pledged. The reason of this difference seems to be the same in principle with that on which equity, as a general rule, refuses to decree a specific performance of an agreement concerning personal chattels; namely, that other things of the same kind, and of the very same worth, even to the owner himself, may be purchased for the sum which the articles in question fetch; and, therefore, if such property is mortgaged, the mortgagee may properly be allowed to sell it, on due notice, without the inconvenience of filing a bill of foreclosure (*g*).

Pledgee's

It appears that in the absence of express agreement

---

(*d*) *Ex parte Mountfort*, 14 Ves. 606, explained in *Fisher on Mortgages*, 2d ed., p. 498 *n.* (*t*), and *Carter v. Wake*, L. R. 4 Ch. Div. 605.

(*e*) *Kemp v. Westbrook*, 1 Ves. Sr. 278; *Lockwood v. Ewer*, 9 Mod. 278; *Pothonier v. Dawson*, Holt's N. P. 385; St. 1053.

(*f*) *Kemp v. Westbrook*, 1 Ves. Sr. 278.

(*g*) *Smith's Manual*, 339.

to the contrary, a pledgee may, *even before condition broken*, deliver over the pledge to a purchaser or to a sub-pledgee; and in either case, if the pledge is of a negotiable instrument, the pledgor will be bound; but if the pledge is of a non-negotiable instrument, the pledgor is bound only to the extent of the pledgee's own right: accordingly, in the case of a non-negotiable instrument, if the purchaser or sub-pledgee, upon tender to him, by the pledgor of the amount due to the original pledgee, should refuse to deliver up the pledge to the original pledgor, the original pledgor may have an action of detinue against the party so refusing (*h*).

The doctrine of tacking is applied to mortgages and pledges of personalty, as against the party making them more extensively than as against a mortgagor of real estate; the presumption against the mortgagor or pledgor of personalty being, that, if the mortgagee or pawnee advance any further sums of money to the mortgagor or pawnor, the mortgage or pledge is to be held until the subsequent debt or advance is paid, as well as the original debt; and this, without any distinct proof of any contract for that purpose, such as it is necessary to prove in mortgages of real property (*i*).

Thus, where a policy on the life of A. had been effected under circumstances, which amounted to an assignment of it by way of mortgage to B., to secure a sum lent by him to A., it was held that B. might tack, and retain the proceeds of the policy in satisfaction of a subsequent judgment debt (*j*). This de-

right of transfer.

(b.) As regards tacking.

Judgment and simple contract debts may be tacked.

(*h*) Fisher on Mortgages, 2d ed., p. 71.

(*i*) *Demainbray v. Metcalfe*, 2 Vern. 691; Sp. 772.

(*j*) *Spalding v. Thompson*, 26 Beav. 637.

cision has recently been followed in the case of subsequent debts by simple contract (*k*); but more recently, the right to tack in these cases has been denied (*l*).

---

(*k*) *In re Haselfoot's Estate*, L. R. 13 Eq. 327.

(*l*) *Talbot v. Frere*, 9 Ch. Div. 568, in which *Spalding v. Thompson*, *supra*, and *In re Haselfoot's Estate*, *supra*, are commented upon by Jessel, M.R.

## CHAPTER XIX.

## OF LIENS.

OF liens there are many varieties. Thus, a lien may exist in favour of artisans and others, who have bestowed their labour and services in or towards the repair, improvement, and preservation of the property in respect of which the lien is claimed. A lien has also an existence, in many other cases, by the usages of trade; and in maritime transactions, as in the cases of salvage and general average. It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money. Moreover, a lien even at law is not always confined to the very property upon which the labour or services have been bestowed; but it often is, by the usage of trade, extended to cases of a general balance of accounts, *e.g.*, in favour of factors and others. Consequently, most cases of lien either in themselves involve a foundation for the jurisdiction of equity, or give rise to matters of account; and as the nature of the lien and the amount of the account are often involved in great uncertainty, a resort to a court of equity is in many cases absolutely indispensable for the purposes of justice.

Varieties of lien,—at law and in equity, and foundation of the equitable jurisdiction in lien.

The principal diversities among liens appear to be the following:—

Diversities among liens.

(a.) A *particular* lien on goods,—which is confined to the very goods; and a *general* lien on goods,—which

extends not only to the particular account but also to the general balance of the accounts (a).

(b.) A lien on *lands*,—which commences only when the possession of the lands is parted with to the purchaser; and a lien on *goods*,—which lasts only while the possession is retained by the vendor, and which ceases when it is parted with to the purchaser (b). And,—

(c.) The lien of a solicitor on the *deeds and documents* of his client,—which arises *proprio vigore*, but which at the most is only a passive protection; and the lien of a solicitor on a *fund recovered*,—which arises only upon the court's declaring the solicitor entitled to it, and which is in all cases (when once declared) both an active and (comparatively speaking) an immediate remedy and redress.

The lien of  
a solicitor  
on deeds,  
books, &c.

The lien which a solicitor has on the deeds, books, and papers of his client for his costs, is an instance of a lien originating in custom, and afterwards sanctioned by decisions at law and in equity. This lien is a right not depending upon contract; it wants the character of a mortgage or pledge; it is merely an equitable right to withhold from his client such things as have been intrusted to him as a solicitor, and with reference to which he has given his skill and labour, and not (as already suggested) a right to enforce any active claim against his client (c).

On fund  
realised in a  
suit.

On the other hand, the solicitor's lien upon a fund realised in a suit for his costs of the suit, or immediately connected with it, a lien which (as we have said) he

---

(a) *In re Witt, ex parte Shubbrook*, L. R. 2 Ch. Div. 489.

(b) *Grice v. Richardson*, 3 App. Ca. 319.

(c) *Bozon v. Bolland*, 4 My. & Cr. 358; *In re Messenger, ex parte Calvert*, L. R. 3 Ch. Div. 317; *In re Snell*, L. R. 6 Ch. Div. 105; *In re Mason v. Taylor*, 10 Ch. Div. 729; and see *Newington Local Board v. Eldridge*, W.N., 1879, p. 149.



may actively enforce (*d*),—is the creation of the statute law, the 23 & 24 Vict., c. 127, s. 28, having enacted that it shall be lawful for the court or judge before whom any suit or matter has been heard (*e*), to declare that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter. A solicitor may even be entitled to both these liens at once (*f*), and the lien extends usually to the entire fund, not merely to the particular share of his own client therein (*g*).

It is quite settled that the solicitor's lien on papers exists only as against the client and the representatives of the client; also, that such lien is only commensurate with the right which the client had at the time of the deposit, and is therefore subject to the prior then existing rights of third persons, so that a prior incumbrancer is not prejudiced by it (*h*). And just as the solicitor's lien will not prejudice any prior existing equity, so the solicitor's lien will not be prejudiced by an equity arising subsequently to the inchoation of the lien (*i*). And the like rule appears to extend also to a lien on a fund recovered; thus, it has been decided that the lien of a solicitor on a sum due or payable to his client prevents a set-off against a sum due from the client (*j*).

Lien only commensurate with client's right at the time of the deposit.

---

(*d*) 2 Sp. 802; Smith's Man. 342; *Verity v. Wyld*, 4 Drew. 427; *Haymes v. Cooper*, 33 Beav. 431; *Shaw v. Neal*, 6 W. R. 635.

(*e*) *Higgs v. Schrader*, 3 C. P. D. 252; *Owen v. Henshaw*, 7 Ch. Div. 385.

(*f*) *Pilcher v. Arden, in re Brook*, 7 Ch. Div. 318.

(*g*) *Bulley v. Bulley*, 8 Ch. Div. 479.

(*h*) *Blunden v. Desart*, 2 Dr. & Warr. 405; *Young v. English*, 7 Beav. 10; 2 Sp. 800, 801; *Francis v. Francis*, 5 De G. M. & G. 108; *Turner v. Letts*, 7 De G. M. & G. 243.

(*i*) *Faithfull v. Ewen*, 7 Ch. Div. 495; *Moet v. Pickering*, . Div. 372; and distinguish *Pringle v. Gloag*, 10 Ch. Div. 676.

(*j*) *Ex parte Olland*, L. R. 2 Ch. App. 808; *Ex parte Smith*, L. R. 3 Ch. App. 125.

**Banker's lien.** A banker also has a lien on the securities deposited by a customer for the customer's general balance of account, and this right subsists, where not inconsistent with the terms of a special contract for a specific security (*k*).

**Quasi-liens.** Rights in equity equivalent to liens may also arise under various circumstances. Thus real or personal estate may be charged by an agreement express or implied, creating a trust, which equity will enforce, both against the person creating the lien, and against others claiming, as volunteers, or with notice, under him. Under this head will fall the cases of legacies and portions charged on land.

As where a charge in the nature of a trust.

**Vendor's lien for advances for improvements.**

It has been held that, where a man agrees to sell his estate, and to lend money to the purchaser for improving the estate, he will have a lien for the advances so made, as well as for the purchase-money (*l*).

**Joint-tenant's lien for costs of renewing lease.**

If one of two joint-tenants of a lease renew for the benefit of both, he will have a lien on the moiety of the other joint-tenant for a moiety of the fines and expenses (*m*).

**No lien where two purchase and one pays the money.**

But it seems that where two or more purchase an estate, and one pays the money, and the estate is conveyed to them both, the one who pays the money gains neither a lien nor a mortgage, because there is no contract for either; he has a right of action only (*n*). So also if one of two joint lessees and occupiers of a house redecorates it at his own expense in the first instance, he has no lien in respect thereof (*o*), and in such a case he may have no action or remedy at all.

---

(*k*) *In re European Bank*, L. R. 8 Ch. App. 41.

(*l*) *Ex parte Linden*, 1 Mont. D. & D. 435; 2 Sp. 803.

(*m*) *Ex parte Grace*, 1 B. & P. 376.

(*n*) 2 Sp. 803.

(*o*) *Kay v. Johnson*, 21 Beav. 536; and see *Saunders v. Dunman*, 7 Ch. Div. 825.

## CHAPTER XX.

## PENALTIES AND FORFEITURES.

THE doctrine of equity with regard to penalties and forfeitures may be stated in the following words:—

Wherever a penalty or a forfeiture is inserted, merely to secure the performance of some act, or the enjoyment of some right or benefit, equity regards the performance of such act, or the enjoyment of such right or benefit, as the substantial and principal intent of the instrument, and the penalty or forfeiture as only accessory, and will therefore relieve against the penalty or forfeiture by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained (*a*). The penal sum is usually double the amount of the debt, and the obligee never recovers on account of principal, interest, and costs, or damages, more than the amount of the penalty, and usually much less.

Doctrine.

Penalty, &c.,  
deemed access-  
sary.  
Compensation  
decreeed.

In all these cases, the general test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made. If compensation can be made, then if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon his paying the principal and interest (*b*). And if the penalty is to secure the performance of some collateral act or undertaking, the court will ascertain the amount of damages and grant relief on payment thereof (*c*).

Can compen-  
sation be  
made?

If it can,  
equity re-  
lieves.

(*a*) *Sloman v. Walter*, 2 L. C. 1112.

(*b*) *Elliott v. Turner*, 13 Sim. 477.

(*c*) *Daniell's Ch. Pr.* 1510-1512.

Party cannot avoid the contract by paying the penalty.

Although equity will generally relieve against a penalty, where it is only intended to secure the performance of a contract; on the other hand, it will not permit the party bound by the agreement to avoid that agreement by paying the stipulated penalty. "The general rule of equity," observes Lord St. Leonards, in *French v. Macale* (d), "is, that if a thing be agreed to be done, though there is a penalty annexed to its performance, yet the very thing itself must be done" (e).

*French v. Macale*,—Where covenantor may do either of two things, paying higher for one alternative than the other, that is not a case of penalty.

Where, however, upon the construction of the contract, the real intent of the contract is that a covenantor should have either of two alternative modes of user at his option,—that if he elects to adopt one of those alternatives, he is to pay a certain sum of money, but that, if he chooses to adopt the other alternative, he is to pay an additional sum of money,—in such a case, equity will look upon the additional payment, not as a penalty, but as liquidated damages fixed on by the parties, and will not relieve the covenantor from payment of the additional sum agreed upon, in case he should do such latter alternative act. This distinction is taken by Lord St. Leonards, in the case of *French v. Macale* (f), where he lays down the law as follows:—"If a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; he cannot elect to break his engagement by paying for his violation of the contract. . . . The question for the court to ascertain is, whether the party is restricted by covenant from doing the particular act, although, if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have

(d) 2 Drew. & War. 274.

(e) *Howard v. Hopkyns*, 2 Atk. 370.

(f) *Ubi supra*. See also *Parfitt v. Chambre*, L. R. 15 Ep. 36.

a right to do the act, on payment of what is agreed upon as an equivalent. If a man let meadow-land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking-up the land is not inconsistent with the contract, which provides that in case the act is done the landlord is to receive an increased rent." Lord Rosslyn said of such a case as that (g), "that it was the demise of land to a lessee, to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; that is a different case from an agreement not to do a thing, with a penalty for doing it" (h).

Having premised the above general remarks, it is proposed to lay down a few rules which may aid the student in arriving at a solution of the question, whether a sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty, or as liquidated and ascertained damages:—

1. Where the payment of a smaller sum is secured by a larger, the sum agreed for must always be considered as a penalty (i). 1. Smaller sum secured by larger.

2. Where a deed contains covenants, or an agreement contains provisions, for the performance of several acts, and then a sum is stated at the end to be paid upon the breach of *any* or of *all* such stipulations, and that sum will be in some instances too large, and in others too small a compensation for the injury occasioned, that sum is to be considered as a penalty. 2. Covenant to do several things, and one sum for breach of *any* or *all*.

---

(g) *Hardy v. Martin*, 1 Cox. 27.

(h) *Herbert v. Salisbury & Yeovil Railway Company*, L. R. 2 Eq. 221.

(i) *Astley v. Weldon*, 2 B. & P. 350-354; *Aylet v. Dodd*, 2 Atk. 239.

*Kemble v. Farren*,—a case in which penal sum was declared not penal but liquidated, and yet court relieved.

Thus, in *Kemble v. Farren* (*j*), the defendant had engaged to act as principal comedian at Covent Garden for four seasons, conforming in all things to the rules of the theatre. The plaintiff was to pay the defendant £3, 6s. 8d. every night the theatre was open, with other terms. The agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by such omission should amount, and which sum was thereby declared by the parties to be liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof. The breach alleged was, that the defendant refused to act during the second season. Notwithstanding these sweeping words, the court decided that the sum must be taken to be a penalty, as it was not limited to those breaches which were of an uncertain nature and amount. And Tindal, C. J., said, "that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction in terms" (*k*).

3. Where amount of injury cannot be measured.

3. On the other hand, if there be a contract consisting of one or more stipulations, the damages from the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty (*l*).

4. If only one

4. There never was any doubt that if there be only

(*j*) 6 Bing. 141.

(*k*) Mayne on Dam. 3d ed. 192; *Davies v. Penton*, 6 B. & C. 223; *Horner v. Flintoff*, 9 M. & W. 681; 3 Byth. & Jarm. Conv. by Sweet. 325; *Dimech v. Corlett*, 12 Moo. P. C. C. 199.

(*l*) Mayne on Dam. 3d ed. 129; *Atkyns v. Kinnier*, 4 Exch. 776-783; *Galsworthy v. Strutt*, 1 Exch. 659.

one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation in order to avoid the difficulty (*m*).

5. The mere use of the term "penalty," or "liquidated damages," does not determine the intention of the parties, that the sum stipulated should really be what it is said to be; but it is like any other question of construction, to be determined by the nature of the provisions, and the language of the whole instrument (*n*).

5. The mere use of term "penalty," or "liquidated damages," not conclusive. A question of construction.

6. Where the expressions are doubtful or contradictory, the court, it seems, will lean in favour of the construction which treats the sum named as a penalty only, and not as fixing the measure of the damages, such construction being most consonant with justice (*o*). But the mere largeness of the amount fixed will not *per se* be sufficient reason for holding it to be a penalty (*p*).

6. Court leans towards construing sum as a penalty.

The same general principles, which apply to equitable relief against penalties, govern the courts of equity in relieving against forfeitures,—at least in cases other than those arising under leases and other strict contracts (*q*). And even in the case of leases, equity will interfere to a limited extent to relieve against a forfeiture. Thus, equity will relieve against the forfeiture

Forfeitures governed by same principles as penalties,—excepting as between landlords and tenants.

(*m*) *Sainter v. Ferguson*, 7 C. B. 730; *Sparrow v. Paris*, 8 Jur. N. S. 391; Byth. & Jarm. Conv. by Sweet, 326; Mayne on Dam. 3d ed. 130.

(*n*) *Dimech v. Corlett*, 12 Moo. P. C. C. 199; *Green v. Price*, 13 M. & W. 701; 16 M. & W. 346; *Jones v. Green*, 3 You. & J. 304.

(*o*) *Davies v. Penton*, 6 B. & C. 216.

(*p*) *Astley v. Weldon*, 2 B. & P. 351.

(*q*) *Cooper v. L. B. & S. C. Ry. Co.*, 4 Exch. Div. 88.

of a lease for non-payment of rent, on the lessee paying what is due (*r*),—that being a mere money demand.

Forfeiture  
for breach  
of covenant  
to repair.

It seems not quite settled whether equity will (and the better opinion is, that equity cannot) relieve against a forfeiture arising from a breach of covenant to repair, or, in fact, any breach of covenant other than the breach of covenant to pay rent, unless under very special circumstances (*s*). Equity will, however, require the covenantee to be satisfied with a substantial performance on the part of the covenantor, where the nature of the covenant admits of such performance. But if the contract be such that the court cannot secure its substantial performance, or where it is of the very essence of the contract, that it should be strictly performed (in which case, the strict performance is matter of substance and not of form merely), equity will not relieve against a forfeiture for non-performance (*t*).

Breach of  
covenant to  
insure.

The courts of equity could not relieve a tenant from forfeiture for breach of a covenant to insure (*u*). “Lord Eldon laid it down that the court would not relieve against breaches of covenant except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been if there had been no breach. In this case the landlord could not by any payment of money be put into the same situation, as he was entitled to be under the covenant.” This rule having been found to operate

---

(*r*) *Freem. Ch. Rep.* 114. The common law courts may now relieve in such a case, 15 & 16 *Vict.*, c. 76, ss. 210–212; 23 & 24 *Vict.*, c. 126, s. 1; *Bowser v. Colby*, 1 *Hare*, 126.

(*s*) *Hill v. Barclay*, 18 *Ves.* 62.

(*t*) *Hill v. Barclay*, 16 *Ves.* 402; 18 *Ves.* 62; *Gregory v. Wilson*, 9 *Hare*, 683; *Nokes v. Gibbon*, 3 *Drew.* 681; *Bamford v. Creasy*, 3 *Giff.* 675; *Croft v. Goldsmid*, 24 *Beav.* 312.

(*u*) *Green v. Bridges*, 4 *Sim.* 96.



very hardly on those few lessees who inadvertently and not wilfully neglected to insure, the legislature stepped in and remedied it, but in the case of such inadvertent neglects only. Under 22 & 23 Vict., c. 35, <sup>22 & 23 Vict.,</sup> s. 4, the court of equity is in that case entitled to <sup>c. 35.</sup> relieve against a forfeiture for non-insurance, but only upon a full compliance with the particulars in the Act expressed, and which are,—that no damage from fire shall, in the meantime, have happened, and that the inadvertence has been purged by the effecting of a proper fire-insurance before coming for relief (*v*). And similar jurisdiction has been conferred upon the courts <sup>23 & 24 Vict.,</sup> of common law, by the Common Law Procedure Act <sup>c. 126.</sup> of 1860 (*w*). Of course, now, since the Judicature Acts, 1873-75, law and equity have equal powers in all matters.

---

(*v*) *Page v. Bennett*, 2 Giff. 117.

(*w*) 23 & 24 Vict., c. 126, ss. 2, 3.

## CHAPTER XXI.

## MARRIED WOMEN.

SECT. I.—SEPARATE ESTATE.

SECT. II.—PIN-MONEY AND PARAPHERNALIA.

SECT. III.—EQUITY TO A SETTLE-

MENT AND RIGHT OF SURVIVORSHIP.

SECT. IV.—SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.

IN no respect do the rules of equity show a more complete divergence from those of the common law than on the subject of the rights and liabilities of married women.

Rights of  
*feme covert* at  
common law.

The husband  
takes all her  
property as a  
general rule.

By the common law the husband on marrying becomes entitled to receive the rents and profits of the wife's real estates during the joint lives (*a*); he becomes absolutely entitled to all her chattels personal in possession (*b*), and to her choses in action if he reduce them into possession during the coverture (*c*); or if he do not, but survive her, he (*d*), and after his death his administrator (*e*), on taking out administration to the wife, is entitled to recover. He also becomes entitled *jure mariti* to her legal chattels real, *i.e.*, leaseholds, with full power to aliene them even though

---

(*a*) *Polyblank v. Hawkins*, Doug. 329; *Moore v. Vinten*, 12 Sim. 161.

(*b*) Co. Litt. 300 a.

(*c*) *Scarwen v. Blunt*, 7 Ves. 294; *Wildman v. Wildman*, 9 Ves. 174; Co. Litt. 351.

(*d*) *Betts v. Kimpton*, 2 B. & Ad. 277; *Proudley v. Fielder*, 2 My. & K. 57.

(*e*) *In the goods of Harding*, L. R. 2 P. & D. 394.

reversionary (*f*); though, if he die before his wife without having reduced into possession her choses in action (*g*), or without having aliened her chattels real (*h*), they will survive to her.

The husband acquires this interest in the property of his wife in consideration of the obligation, which upon marriage he contracts, of maintaining her. But while the courts of common law were thus active in enforcing the rights of the husband, they rather overdid matters, and frequently to the detriment of the wife; for they gave her no remedy whatever in case even of the husband's refusing or neglecting to fulfil the duties cast upon him by the marriage, or in the case of the husband's bankruptcy or insolvency. In all these cases, therefore, a married woman resorting to the common law might have been left utterly destitute, no matter how large a fortune she might have brought to her husband on marriage. Can it be a matter of surprise, therefore, that equity, holding that there should be no wrong without a remedy, found ample ground for its interference, and raised up, with reference to married women, a system founded on justice and right, and utterly in contravention of the doctrines of the common law.

In consideration of maintaining her. Wife remediless at common law.

Interference of equity.

So beneficial has this equitable jurisdiction proved to be, and so much in harmony with the requirements of modern society, that it has at length received a legislative sanction. By the Married Women's Property Act, 1870, amended by the Married Women's Property Act, 1874, a *feme covert* is enabled to obtain a legal title to certain classes of property, and to protect the same by independent proceedings in courts of law, in the same manner as a *feme sole*.

Married Women's Property Act, 1870 (33 & 34 Vict., c. 93), and amending Act, 1874.

(*f*) *Donne v. Hart*, 2 Russ. & My. 363; *Bales v. Dandy*, 2 Atk. 207; 3 Russ. 72 n.  
(*g*) Co. Litt. 351 b.

(*h*) *Ibid.*

Protective  
jurisdiction  
of Court of  
Chancery.

It is proposed to consider the original jurisdiction of the Court of Chancery regarding married women, which still continues in its entirety, though with a scope widened in certain instances by the recent legislation, and incidentally to explain the effect of such recent legislation.

### SECTION I.—THE WIFE'S SEPARATE ESTATE.

*Feme covert*  
cannot at com-  
mon law hold  
property apart  
from her  
husband.  
But she may  
do so in  
equity.

At common law the separate existence of the wife is not, as a general rule, known or contemplated, it being considered merged by the coverture in that of the husband, and the wife being no more recognised than is the *cestui que trust* or the mortgagor; the legal estate, which is the only interest the law recognises, being in others (*i*). She is not permitted by the common law to take or enjoy any real or personal estate separate from and independently of her husband. But in equity, whose creature the wife's separate estate is (*j*), the case is widely different. There a married woman is considered capable of possessing property to her own use, independently of her husband; and upon once being permitted to hold property to her separate use as a *feme sole*, she takes it with all its privileges and incidents, including the *jus disponendi* (*k*).

Separate  
estate, how  
created.

The wife's separate estate may be created out of any species of property, and the modes in which it has been held that property may belong to her independently of her husband are various, being, however, principally the following:—

1. By ante-  
nuptial agree-  
ment.

1. The wife may hold separate estate by an ante-nuptial written agreement with the intended husband for that purpose; and such ante-nuptial agreement

(*i*) *Murray v. Barlee*, 3 My. & K. 220.

(*j*) *Brandon v. Robinson*, 18 Ves. 434.

(*k*) *Fettiplace v. Gorges*, 1 Ves. Jr. 48.

may be made with reference either to her own property, or to the property of her husband, or of third parties (*l*).

2. By special agreement with the husband after marriage in certain cases (*m*), or where the husband deserts her, independently of and long prior to the stat. 20 & 21 Vict., c. 85 (*n*). Also, in more recent times, under the stat. 20 & 21 Vict., c. 85, s. 21, amended by the stat. 21 & 22 Vict., c. 108, s. 8, if a wife is deserted by her husband, she may obtain an order of protection of her property against her husband and his creditors; and by 20 & 21 Vict., c. 85, s. 25, if judicially separated, she is to be deemed a *feme sole* as regards her property; and in case of subsequent cohabitation, it shall be held to her separate use (*o*). And the separate estate may arise ever under a private Act of Parliament (*p*).

2. By special post-nuptial agreement, or where he deserts her.

Statutory enactments, as to separate estate, previous to Married Women's Property Act, 1870.

3. Gifts also from the husband to the wife may be made to her separate use, where they are made to her absolutely, and not merely to be worn as ornaments of her person (*q*).

3. By gifts to wife absolutely from husband.

4. It seems also that a gift from a stranger by delivery merely to the wife during her coverture, even though not expressed to be for her separate use, would be for her separate use (*r*).

4. By gifts to her from a stranger during coverture.

(*l*) *Simmons v. Simmons*, 6 Hare, 352; *Tullett v. Armstrong*, 1 Beav. 21.

(*m*) *Haddon v. Fladgate*, 1 Swab. & Tr. 48; *Pride v. Bubb*, L. R. 7 Ch. App. 64; *Ashworth v. Outram*, L. R. 5 Ch. Div. 923.

(*n*) *Cecil v. Juxon*, 1 Atk. 278; *Re Pope's Trusts*, 21 W. R. 646; 2 Bright's Husb. & Wife, 299.

(*o*) *In re Rainsdon's Trusts*, 4 Drew. 446; *Rudge v. Weedon*, 4 De G. & Jo. 216, 223; *Nicholson v. Drury Buildings*, 7 Ch. Div. 48.

(*p*) *In re Peacock's Trusts*, 10 Ch. Div. 490.

(*q*) *Graham v. Londonderry*, 3 Atk. 393; *Grant v. Grant*, 13 W. R. 1057; *Mews v. Mews*, 15 Beav. 529; *Baddeley v. Baddeley*, 9 Ch. Div. 113.

(*r*) *Graham v. Londonderry*, 3 Atk. 393; 1 Bright's Husb. & Wife, 289.

5. Wife trading separately.

5. A wife trading separately is entitled to the trade property as her separate estate (*s*).

6. By express limitation for that purpose.

6. The wife will, of course, hold all such property to her separate use as has been expressly limited to her by devise or otherwise for that purpose, whether before or after coverture; and this is probably the most frequent source of the separate estate of married women, or at all events was so before the Married Women's Property Acts, 1870 and 1874, hereinafter explained.

Interposition of trustees,—not necessary.

It was formerly supposed, that the interposition of trustees was in all arrangements of this sort, whether made before or after marriage, indispensable for the protection of the wife's rights and interests; in other words, it was deemed absolutely necessary that the property, of which the wife was to have the separate and exclusive use, should be vested in trustees for her benefit; and that the agreement of the husband should be made with such trustees, or at least with persons contracting with them for the wife's benefit. But although in strict propriety that should always be done, yet it is now firmly established that the intervention of trustees is not indispensable; and that whenever real or personal property is devised to, or otherwise given to or settled upon, a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the rights and claims of her husband, and of his creditors also (*t*). And in such a case, the husband will be held a mere trustee for her (*u*).

Husband a trustee for wife.

(*s*) *Ex parte Shepherd, in re Shepherd*, 10 Ch. Div. 573.

(*t*) *Newlands v. Paynter*, 4 My. & Cr. 408.

(*u*) *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 375; St. 1380.

No particular form of words is necessary in order to vest property in a married woman for her separate use. It has been held that the marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or trustees for her, for her "sole and separate use" (*v*), "for her own use, and at her own disposal" (*w*), "for her own use, independent of her husband" (*x*), "for her own use and benefit, independent of any other person" (*y*), "that she should receive and enjoy the issue and profits" (*z*). As to the effect of a devise to a woman, "for her sole use and benefit," there seems to be some doubt upon the authorities. In *Gilbert v. Lewis* (*a*), Westbury, C., held that a devise to an unmarried woman without the intervention of trustees, for her sole use and benefit, did not give her a separate estate (*b*).

On the other hand, it is no less firmly established, that courts of equity will not deprive the husband of his rights at law, except by words which leave no doubt of the intention to exclude him. It has been held, therefore, that no separate use was created where there was a mere direction, "to pay to a married woman and her assigns" (*c*), or where there was a gift "to her own use and benefit" (*d*), or to her "absolute use" (*e*), or when payment was directed to be made "into her own proper hands, to and for her own use and benefit" (*f*), or when property was given "to be under her sole control" (*g*).

---

(*v*) *Parker v. Brooke*, 9 Ves. 583.

(*w*) *Inglefield v. Coghlan*, 2 Coll. 247.

(*x*) *Wagstaff v. Smith*, 9 Ves. 520.

(*y*) *Glover v. Hall*, 16 Sim. 568.

(*z*) *Tyrrell v. Hope*, 2 Atk. 558.

(*a*) 1 De G. Jo. & Sm. 38.

(*b*) *In re Tarsey's Trusts*, 1 L. R. Eq. 561.

(*c*) *Lumb v. Milnes*, 5 Ves. 517.

(*d*) *Kensington v. Dollond*, 2 My. & K. 184.

(*e*) *Ex parte Abbot*, 1 Deacon, 338.

(*f*) *Tyler v. Lake*, 2 Russ. & My. 183.

(*g*) *Massey v. Parker*, 2 My. & K. 174.

The wife's power of disposition over separate estate.

The rule is laid down in *Peacock v. Monk* (*h*), "that a *feme covert* acting with respect to her separate property is competent to act in all respects as if she was a *feme sole*" (*i*). Where, however, the restriction on anticipation is annexed to the separate use, this power of disposition is taken away.

(a.) As to personality.

(a.) It is decided, that personal property settled upon a *feme covert* for her separate use, is subject to all the incidents of property vested in persons *sui juris*, and that she may dispose of it without her husband's consent, whether by act *inter vivos* (*j*), or by will (*k*), and this power extends to interests in reversion, as well as to interests in possession (*l*); and her husband need not concur in the disposition, and the wife need not acknowledge same.

b.) As to realty.  
1. Life estate.

(b.) As to real estate, it is also determined, that when settled to the separate use of a married woman, she has the same power over her *life interest* therein, as she would have as a *feme sole*, and a contract to sell or mortgage that interest has been always specifically enforced against her (*m*).

2. Fee simple estates.

With regard to real property settled to the separate use of a *feme covert* in fee, it has always been perfectly well ascertained, that so far as regards the *legal* estate, she cannot dispose of that without the concurrence of the person or persons in whom that estate is vested (*viz.*, of her husband or of other her trustees, as the case may be); but as regards the equitable estate it has finally, after much apparent conflict in the autho-

(h) 2 Ves. 190.

(i) *Hulme v. Tenant*, 1 L. C. 521.

(j) *Wagstaff v. Smith*, 9 Ves. 520.

(k) *Fettiplace v. Gorges*, 3 Bro. C. C. 8; *In the goods of Smith*, 1 Sw. & Tr. 125.

(l) *Sturgis v. Corp.*, 13 Ves. 190; *Lechmere v. Brotheridge*, 32 Beav. 353.

(m) *Stead v. Nelson*, 2 Beav. 245; *Major v. Lansley*, 2 Russ. & My. 357.



rities, been decided in the important case of *Taylor v. Meads* (n), that she may dispose of the equitable estate either by will or by an instrument *inter vivos* not acknowledged under the Fines and Recoveries Act (o). And she has this power whether trustees are interposed or not (p). Even if trustees be interposed, it is now clear that a married woman can bind her separate property without their assent, unless that is rendered necessary by the instrument giving her the property (q). As to the question whether such disposition of her fee simple estates by deed or by will would deprive the husband surviving her of his curtesy estate, assuming that he would otherwise be entitled thereto, the law seems now to be fully settled; for although in the absence of, or subject to, any such disposition by the wife, the husband is entitled to his curtesy, yet in case the wife disposes of the whole estate by deed *inter vivos*, or even by will, the authorities have now fully and explicitly decided (inconsistently with the old rules of real property, but consistently enough with the equitable doctrine of the separate estate), that the husband is by such disposition wholly barred and excluded from his estate by the curtesy (r).

Upon the principle that a married woman as to her separate property is to be deemed a *feme sole*, she will render it liable by concurring with her trustees in a breach of trust (s), or by herself committing a breach of trust in respect of other property

Separate property liable for her breach of trust. Except restrained from anticipation.

---

(n) 34 L. J. Ch. 203; *Pride v. Bubb*, L. R. 7 Ch. App. 64.

(o) 3 & 4 Will. IV., c. 74, s. 77.

(p) *Hall v. Waterhouse*, 13 W. R. 633.

(q) *Essex v. Atkins*, 14 Ves. 542; *Hodgson v. Hodgson*, 2 Kee. 704.

(r) *Roberts v. Dixwell*, 1 Atk. 607; *Morgan v. Morgan*, 5 Madd. 408; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Cooper v. M'Donald*, L. R. 7 Ch. Div. 288.

(s) *Brewer v. Swirles*, 2 Sm. & Giff. 219; *Jones v. Higgins*, L. R. 2 Eq. 538.

under the trust (*t*), unless she is restrained from anticipation (*u*).

The savings of income of separate estate are also separate estate.

If the wife, having property settled to her separate use, effect savings out of it, she has the same power and control over those savings as she had over the separate estate itself; for in the quaint language of Lord Keeper Cowper, "the sprout is to savour of the root and to go the same way" (*v*); or in less elegant words, the froth on the stout savours of the stout, and goes the same way; and if the wife have a power over the capital, she has also power over the income and accumulations (*w*); and the same rule applies to savings out of the income allowed to a married woman upon her husband's lunacy (*x*). And even the investments made with such savings or with the accumulations thereof belong still to the married woman for her separate use (*y*), a result which, however, does not appear to hold good for the investments of the *capital* moneys of the separate estate (*z*).

She may permit her husband to receive the income of her separate estate, even though restrained from anticipation.

"A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorises the money to be paid to her husband, he is entitled to receive it, and she can never recall it. . . . If the husband and wife living together, have for a long time so dealt with the separate income of the wife, as to show that they must have agreed that it should come to the hands of the husband, to be used by him (of course, for their joint purposes), that would amount to evidence of a direc-

(*t*) *Clive v. Carew*, 1 J. & H. 199.

(*u*) *Davies v. Hodgson*, 25 Beav. 186; *Pemberton v. M'Gill*, 1 Drew. & Sm. 266; *Stanley v. Stanley*, 26 W. R. 310; 7 Ch. Div. 589.

(*v*) *Gore v. Knight*, 2 Vern. 535.

(*w*) *Newlands v. Paynter*, 4 My. & Cr. 408; *Humphrey v. Richards*, 2 Jur. N. S. 432.

(*x*) *Re Sharp*, 3 Pub. Div. 76.

(*y*) *Barrack v. M'Culloch*, 3 Kay & J. 110.

(*z*) *Wright v. Wright*, 2 J. & H. 647, stated *infra* in this section.

tion on her part that the separate income, which she otherwise would be entitled to, should be received by him" (a); and even in cases where she is entitled to an account against him for such receipts, the general rule seems to be, that he shall be obliged to account for one year's receipts only (b). But as regards the capital or corpus of the separate estate, the wife may dispose of same to her husband, only if she is not restrained from anticipation.

In any case, she is entitled to only one year's account.

If a *feme covert*, having personal estate settled to her separate use, die without disposing of it, the husband will be entitled to it; and all those parts thereof that consist of cash, furniture, or other personal chattels, or of chattels real (c), he will take in his marital right (d), and all such parts thereof as consist of "choses in action," he will be entitled to take as her administrator (e), and in either case for his the husband's own benefit, although as regards the choses in action (and, *quaere*, also as regards the property which he takes *jure mariti*) subject to his wife's debts.

Husband takes separate personal estate undisposed of.

*Jure mariti*.

Or as her administrator.

Although a man having a general power of appointment over property, which in default of appointment, goes to others, by exercising his power makes the appointed property assets for payment of his debts, in an administration of his estate after his death (f), yet it has been held, that if a married woman exercises such a power, the appointed property will not be applicable to the payment of her debts in such an administration of her estate.

Property subject to a general power of appointment.

(a) *Caton v. Rideout*, 1 Mac. & G. 601; *Rowley v. Unwin*, 2 K. & J. 138; *Dixon v. Dixon*, 9 Ch. Div. 587.

(b) *Lewin Tr.* 549; *Peachey on Settlements*, 291; but see *Darkin v. Darkin*, 17 Beav. 578.

(c) *Co. Litt.* 46 b.; *Dyer*, 251.

(d) *Molony v. Kennedy*, 10 Sim. 254; *Johnstone v. Lumb* 15 Sim. 308.

(e) *Proudley v. Fielder*, 2 My. & K. 57.

(f) *Jenney v. Andrews*, 6 Mad. 264.

Differences between separate property and general power of appointment in a married woman.

(a.) Separate property not recognised at common law. But married woman's right to execute a power of appointment recognised both at law and in equity.

(b.) *Feme covert* cannot contract a debt to bind her appointment property; but *secus*, as regards her separate property, *see infra*.

In case of her fraud, her property generally being liable, a fund appointed by her under a general power is also liable, at least where, as in *London Chartered Bank v. Lempriere*,—the power of appointment is rather an incident of the separate estate than a power additional to it.

This distinction is based upon the difference between property and power. A power of appointment in a married woman is a very different thing from property itself, even when settled to her separate use. Separate use is purely a creature of equity, and utterly unknown to the common law; whereas, that a married woman has the right and capacity to exercise a power of appointment, is as much the doctrine of a court of law, as it is of a court of equity. It is not necessary she should be regarded as a *feme sole* in order to do that.

And although in equity she is a *feme sole* as regards her separate estate, and may contract by express agreement a debt payable out of that property, she cannot, it was said, by mere contract, incur a debt payable out of her property, over which she has a mere power of appointment, because she cannot contract a debt except to the extent of such property as is settled to her separate use; therefore her ordinary creditors have no right to be paid out of the fund which she appointed (g). But, notwithstanding the incapacity of a married woman to incur a debt merely by contract, yet it is well established that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of such fraud (h); that by fraud she renders her general property liable; and further, that, if it be insufficient, then, as in the case of a *feme sole*, or a man, the appointed fund becomes liable to supply any deficiency (i). The doctrine that property subject to a married woman's power of appointment is not liable for the payment of debts, appears to have been considerably modified,

(g) *Shatlock v. Shatlock*, L. R. 2 Eq. 186.

(h) *Savage v. Foster*, 9 Mod. 35; *Blain v. Terryberry*, 11 Gr. 286.

(i) *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Shatlock v. Shatlock*, L. R. 2 Eq. 182.

if not entirely overruled, by the decision of the Privy Council in the recent case of *The London Chartered Bank of Australia v. Lempriere (j)*. There Mrs. Aitkin was entitled to large personal estate, settled to her separate use with remainder as she should by will or deed appoint. *She was not restrained from anticipation.* At the request of her bankers she gave them a letter, charging her interest (which was comprised in the settlement) in a fund standing to her credit as administratrix of her late husband, as a security for overdrafts on her private banking account. Mrs. Aitkin subsequently made her will in execution of the power, and died largely indebted on her private account, whereupon a suit was brought to charge her interest in the fund. The cases of *Vaughan v. Vanderstegen* and *Shattock v. Shattock* were cited to show that the corpus could not be liable, but James, L. J., in delivering the judgment of the court, decided in favour of the Bank. His Lordship there said,—“In the present case it is to be noted that the gift is to the married woman for her separate use for life, with remainder as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors or administrators. Their Lordships are satisfied that on the weight of authority and on principle they ought to treat this as what it is in common sense, and to common apprehension it would be, *an absolute gift to the sole and separate use* of the lady. The words are an expansion and expression of what would be implied in the words sole and separate use; and their Lordships conceive themselves at liberty to hold that such a form of gift to a married woman, *without any restriction on anticipation*, vests in equity the entire corpus in her for all purposes, as fully as a similar gift to a man would vest it in him.” It will be ob-

served that in this case the power of appointment, which was by *deed or will*, had been exercised by will, though on the grounds of the decision as above cited it would appear that actual execution of the power was not necessary to render the fund liable to satisfy the claim of the Bank. In the similar case of *Heatley v. Thomas (k)*, cited with approval in the judgment, the power was exercisable by will only.

Though generally regarded as a *feme sole* in equity as to her separate estate, she could not originally bind her separate estate with debts.

Although from an early period, courts of equity had so far departed from the settled rules of law with respect to a *feme covert*, as to admit of property being settled in trust for her separate use, and had established the principle that with respect to property so settled, she should be considered a *feme sole*, *quoad* the capacity of enjoying and the capacity of disposing of that property; it is remarkable how long and steadily they refused to grant to her the other capacity of a *feme sole*, that of contracting debts binding upon the property. It might very reasonably be considered, that consistency required that she should have that capacity to the same extent that she was constituted a *feme sole*. After a time, however, being pressed by the injustice of allowing her, after having solemnly and deliberately entered into an engagement for the payment of money, to continue in the enjoyment of her separate property without paying her creditors, the courts, at first, ventured so far as to hold, that if she made a contract for payment of money by a written instrument, with a certain degree of formality and solemnity, as by a bond under her hand and seal (*l*), in that case, the property settled to her separate use should be made liable to the payment of it; and this principle, if principle it could be called, was subsequently extended to instruments of a less formal character, such as to bills

Successive relaxations of this rule.  
(1.) Her separate estate was bound by an instrument under seal.

(2.) By bill or note.

(3.) By ordinary written agreement.

(k) 15 Ves. 596.

(l) *Hulme v. Tenant*, 1 L. C. 525; *Heatley v. Thomas*, 15 Ves. 596.

of exchange (*m*), or promissory-notes (*n*), and ultimately to any written agreement (*o*).

But still the courts refused to extend it to a verbal agreement, or other common assumpsit; and even as to those more formal engagements which they did hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts*, and for that purpose they invented reasons to justify the application of the separate estate to their payment, without recognising them as debts, or letting in verbal contracts. One suggestion was, that the act of disposing of, or charging, separate estate by a married woman, was in reality the execution of a power of appointment, and that a formal and solemn instrument in writing would operate as an execution of the power, which a mere assumpsit would not do (*p*). The fallacy of this reasoning has been repeatedly exposed, and it has been truly observed:—1st, that it confounds two things which are quite distinct in their nature,—power and separate use; 2d, that even supposing the act of disposing of separate estate by a married woman to be regarded as the execution of a power, the reason assigned violated the principle long established with respect to powers, that a power could not be executed by an instrument which did not refer either to the power itself, or to the property which was the subject of it; and 3d, that if there be several of such instruments, and they are to be regarded as successive executions of a power, the appointees would rank in the date of the order of their appointments, whereas it is held that where the persons claiming under such instruments

(4.) And last of all, after a final struggle, by her ordinary parol or simple contracts.

Erroneously held that charging the separate estate was executing a power of appointment.

Power and separate property confounded,—although different, because,—

(c.) Appointees under a power rank in order of time, while creditors of

(*m*) *Stuart v. Kirkwall*, 3 Mad. 387; *Owen v. Homan*, 4 H. L. Cas. 997; *M'Henry v. Davies*, L. R. 10 Eq. 88.

(*n*) *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112.

(*o*) *Master v. Fuller*, 1 Ves. Jr. 513; *Murray v. Barlee*, 3 My. & K. 209; *Picard v. Hine*, L. R. 5 Ch. App. 274.

(*p*) *Murray v. Barlee*, 3 My. & K. 223; *Owens v. Dickenson*, 1 Cr. & Pb. 53.

separate  
estate take  
*pari passu*.

are let in upon the separate property of the party executing them, they must stand *pari passu*. Another reason suggested was, that as a married woman has the right and capacity specifically to charge her separate estate, the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation (*q*).

Courts now  
hold that to  
the same ex-  
tent that she  
is regarded as  
a *feme sole*, she  
may contract  
debts.

The inconsistency of drawing this distinction between the different engagements of a married woman having separate estate, with reference to the different forms in which they are contracted, together with the unsatisfactory character of the reasons assigned to justify such distinction, has forced itself more and more on the attention of successive judges; and a growing tendency has been manifested to adopt a more consistent course, by holding, 1st, That to the same extent to which a married woman is, by courts of equity, constituted a *feme sole* with respect to the capacity of disposing of property, she ought also to be regarded as a *feme sole* with respect to the capacity of contracting debts, or engagements in the nature of debts; and 2d, As a corollary of the former, that all such debts or engagements should stand on the same footing, in whatever form contracted (*r*). And, in fact, it may now be considered as settled, that her separate estate may be rendered liable on an assumpsit or verbal engagement. For Kindersley, V.-C., in *Matthewman's case* (*s*), says:—  
“It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal engagement, expressly making her estate liable, such contract would

Her verbal  
engagements  
now binding  
on her sepa-  
rate estate.

(*q*) *Murray v. Barlee*, 3 My. & K. 223.

(*r*) *Vaughan v. Vanderstegen*, 2 Drew. 182.

(*s*) L. R. 3 Eq. 787; see also *Mayd v. Field*, L. R. 3 Ch. Div. 587; *Davies v. Jenkins*, L. R. 6 Ch. Div. 728; *Collett v. Dickenson*, W. N. 1879, 80.



bind it; nor is it necessary that there should be an express reference made to the fact of there being such separate estate, for a bond or promissory-note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable (*t*), provided she be not restrained from anticipation (*u*). If the circumstances are such as to lead to the conclusion that she was contracting not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

The court can make no personal decree against a married woman (*v*), because, *semble*, that would be interfering with the husband's property in her person; therefore, no bankruptcy decree or order for her imprisonment under the Bankruptcy Act, 1869, or the Debtors' Act, 1869, can be made against her (*w*). The extent of the relief afforded by equity against the separate estate of a *feme covert* is thus laid down by Lord Thurlow in *Hulme v. Tenant* (*x*): "Determined cases seem to go thus far, that the general engagement of the wife shall operate upon her *personal property* shall apply to the *rents and profits of her real estate*. . . . I know of no case where the *general engagement* of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance* of that real estate, and by *sale, mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife (*y*). But, of course, the creditors may have execution against both the real and

No personal decree against a *feme covert*.

General engagements bind—the *corpus* of her personality—rents and profits of her realty.

Execution against separate estate.

(*t*) L. J. Turner's remarks in *Johnson v. Gallagher*, 3 De G. F. & Jo. 494.

(*u*) *Atwood v. Chichester*, 3 Q. B. Div. 722.

(*v*) *Francis v. Wigzell*, 1 Mad. 264.

(*w*) *Johnson v. Gallagher*, 30 L. J. Ch. 298; and especially *Ex parte Holland*, in *re Heneage*, L. R. 9 Ch. App. 307; *Ex parte Shepherd*, in *re Shepherd*, 10 Ch. Div. 573; *Ex parte Jones*, in *re Grissell*, W. N. 1879, p. 144.

(*x*) 1 L. C. 526.

(*y*) *Francis v. Wigzell*, 1 Mad. 258; *Aylett v. Ashton*, 1 My. & Cr. 105, 112.

Bill for administration of separate estate.

the personal estate of the married woman during her life; and after her death they may file a bill against her representatives for the administration of her separate estate, which will be treated as equitable assets (z).

Origin of restraint on anticipation.

It has been seen that when first property was permitted to be settled to the separate use of a married woman, equity viewed her as a *feme sole* to the extent of having dominion over the property. It was, however, soon found that this concession to the requirements of justice, though useful and operative in securing to her a dominion over the estate so devoted to her support, was open to the difficulty, that she being at liberty to dispose of it (as a *feme sole* might have disposed of it) was nevertheless left exposed to the persuasion or other mode of influence of her husband, which was often found to defeat the very purpose for which her separate property was given her. To meet, therefore, this further difficulty, a provision was adopted of prohibiting the anticipation of the income, so that the wife should have no dominion over it till the payments actually became due (a). And this mode of settlement was supported on the following reasoning:—That separate estate is purely a creature of equity, devised for the protection of married women, and that being such, equity has a right to act upon its own creature, and to modify it so as to further the object for which separate estate was first created (b). It was for some time thought that a similar fetter might be imposed on property enjoyed by men, without relation to the married state, but Lord Eldon, in *Brandon v. Robinson* (c), decided that in the case of disposition to a man, the *jus disponendi* cannot be taken away from him by a mere prohibition against alienation.

*Feme covert* prohibited against taking the income before actually due.

A man or *feme sole* cannot be so prohibited.

(z) *Owens v. Dickenson*, 1 Cr. & Ph. 48; *Gregory v. Lockyer*, 6 Madd. 90.

(a) *Pybus v. Smith*, 3 Bro. C. C. 339.

(b) *Tullett v. Armstrong*, 1 Beav. 22.

(c) 18 Ves. 429.

The fact is, that any such attempted restraint on alienation in the case of a man would be void for inconsistency or repugnancy; but *the restraint on anticipation is consistent with and in furtherance of the very object of the separate estate of a married woman*, and so can be (and has been) permitted to be good. But for this consistency of the two, equity could not have permitted the device of restraint to succeed; for, of course, equity cannot, any more than law, make valid what is void *in se* for repugnancy.

The power of courts of equity to impose restraints upon the alienation by married women of their separate property having been established, the question next arose as to whether these restraints were to be confined to an actually existing coverture, or might be extended to take effect upon a future marriage. After some wavering of opinion, it was eventually determined in *Tullett v. Armstrong (d)*, that the restriction attached to a subsequent marriage. The Master of the Rolls, in that case, lays down the following general propositions on the nature and effect of the clause in restraint of anticipation:—

The restraint attaches to future covertures.

General rules.

“If the gift be made for her sole and separate use without more, she has, during her coverture, an alienable estate independent of her husband.

(1.) She has a *jus disponendi* over her separate property.

“If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate independent of her husband.

(2.) If restrained, she is entitled to the present enjoyment exclusively.

“In either of these cases she has, when discovered, a power of alienation; *the restraint is annexed to the separate estate only, and the separate estate has its existence only, during coverture; whilst the woman is dis-*

(3.) Separate estate with or without restraint exists only during coverture.

(d) 1 Beav. 1; and see *In re Ridley, Buckton v. Hay*, 10 Ch. Div. 645.

*covert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage.*

(4.) Restraint on alienation depends on, and is a modification of, separate estate—and has no independent existence.

The restriction cannot be considered distinctly from the separate estate, of which it is only a modification; to say that the restriction exists is saying no more than that the separate estate is so modified. . . . If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it" (e).

General conclusion.

It seems to result briefly from the preceding quotation, as follows:—First, That while a spinster, the female entitled for her separate estate, without power of anticipation, may anticipate the entirety or any part of her estate; but that immediately upon her marriage (No. 1), the separate estate, and with it the restraint on anticipation, attach and endure during that coverture; and that upon her widowhood (No. 1) both the separate estate and the restraint dis-attach; and again upon her subsequent marriage (No. 2), and subsequent widowhood (No. 2), and so on *toties quoties*, attaching and dis-attaching, and re-attaching and again dis-attaching, according as she is covert or not from time to time, and for the time being.

In what cases the trust will be wholly destroyed, so as not to attach on marriage.

Inasmuch as a woman, when discovert, has full power of alienation over her separate estate, even though coupled with a restraint against anticipation or alienation, the question sometimes arises, whether the lady has not, by her intervening acts during discoverture, acquired the property unfettered or unrestricted by any trust or restraint, so that neither would attach

---

(e) *Woodmeston v. Walker*, 2 Russ. & My. 197.

or re-attach upon her marriage, as they would have done in the absence of such acts. Thus, in *Wright v. Wright* (f), stock was bequeathed to a woman upon trust for her separate use, without power of anticipation, but without the intervention of trustees; she afterwards, being discovert and *sui juris*, sold the stock, spent a portion of the proceeds, and invested the rest in shares of a joint-stock bank and Canada bonds. Held, that by doing so she had determined the trust for her separate use. Wood, V.-C., said:—"Had she allowed the property to remain *in statu quo*, had she left it until her marriage in the form of investment in which it was bequeathed to her by her parents, then according to *Newlands v. Paynter* (g), the husband must have been considered as adopting the property in the state in which they left it, and subject to the trusts that, while in that state, they had impressed upon it. But she did not leave it in that form; having the sole ownership of the property, and being single and *sui juris*, she sold it and received the purchase-money. When the property was in her hands as money, it was absolutely hers, as if it had never been fettered by any trust whatever. By selling the property, she disposed of it finally and entirely (h).

If property remained *in statu quo*, husband must take it with the trusts impressed upon it.

But if she sell it, and receive the purchase-money, the trust is destroyed.

The effect of disposing of the *corpus* here stated is, of course, to be distinguished from the effect already stated in a previous page of disposing of the savings of income in the purchase of investments, and the subsequent variation of such investments (i). It has been held that a married woman, although restrained from anticipation, may bar an estate tail (j), or accept pay-

(f) 2 J. & H. 647.

(g) 4 My. & Cr. 408.

(h) *Buttanshaw v. Martin*, Johns. 89.

(i) *Barrack v. M'Culloch*, 3 Kay. & J. 110.

(j) *Cooper v. Macdonald*, 7 Ch. Div. 288.

ment out of court (*k*), neither of these acts involving any anticipation.

What words  
will restrain  
alienation,—  
*Field v. Evans*.

As in the case of the separate use, so in the case of the restraint on anticipation, no particular form of words is necessary to restrain alienation, if the intention be clear. Thus, when property was settled, and it was directed that the trustee should, during the lady's life, receive the income "when and as often as the same should become due," and pay it to such persons as she might from time to time appoint, or to permit her to receive it for her separate use; and that her receipts, or the receipts of any person to whom she might appoint the same *after it should become due*, should be valid discharges for it; it was held that she was restrained from anticipating the income (*l*). So also where property is given to the separate use of a married woman, "not to be sold or mortgaged," she will take with a restraint or alienation (*m*).

What words  
will not re-  
strain aliena-  
tion,—*Parkes*  
*v. White*.

On the other hand, where a testator bequeathed a sum of stock in trust for the separate use of his wife for her life, and directed that it "should remain during her life, and be, under the orders of the trustees, made a duly administered provision for her, and the interest given to her *on her personal appearance and receipt*," by any banker the trustees might appoint, it was held that the widow, who had married again, was not restrained from alienating her interest in the stock (*n*). Where expressions are used giving the wife a right to receive separate property "with her own hands from time to time," or so that her receipts "alone, for what should be actually" paid into her own proper hands, should "be good discharges," they are, to use the

(*k*) *In re Crompton's Trusts*, 8 Ch. Div. 460.

(*l*) *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 De G. M. & G. 597.

(*m*) *Steedman v. Poole*, 6 Ha. 193; *Baggett v. Meux*, 1 Coll. 138.

(*n*) *In re Ross's Trust*, 1 Sim. N. S. 196.

words of Lord Eldon, only an *unfolding* of all that is implied in a gift to the separate use (*o*).

But although it be true that these cases of separate uses and restraints are mere "creatures of equity," still it does not follow that a court of equity can dispense with or mould either of them, especially the restraints, as, and when, it thinks fit, any more than it could do so with other executed trusts. Accordingly, where a testator gave a legacy to a married woman upon this condition, that within twelve months she should execute a certain conveyance of her separate estate which was subject to a restraint against anticipation, it was held that the court had no power to release the property from that restraint, even though it should be clearly for her benefit (*p*). But the court may of course do so under the provisions of an Act of Parliament for the purposes of the Act (*q*).

Court of equity cannot dispense with the fetter on alienation.

Such being the rights and liabilities of married women, arising from the equitable doctrine of separate estate, it remains to consider their position under the Married Women's Property Act, 1870, and the amending Act of 1874. By the Act of 1870, which came into operation on the 9th of August 1870, the principles which had proved so beneficial, as applied in courts of equity, have been recognised and adopted, at the same time that increased powers for the acquisition and protection of separate property have been conferred. Not only have new classes of separate property been created, and facilities for its investment been given, but a *feme covert* is now enabled to take proceedings, both at law and in equity, for the protec-

Married Women's Property Act, 1870, 33 & 34 Vict., c. 93.

(*o*) *Parkes v. White*, 11 Ves. 222; *Acton v. White*, 1 Sim. & St. 429; *Rose v. Sharrod*, 11 W. R. 356.

(*p*) *Robinson v. Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535; *Gaskell's Trusts*, 11 Jur. N. S. 780; but see *Sanger v. Sanger*, L. R. 11 Eq. 470, decided under 33 & 34 Vict., c. 93, s. 12.

(*q*) Leases and Sales of Settled Estates Act, 1877, s. 50.

tion of her property, freed from the disabilities heretofore attaching to coverture, without losing, as it appears, except in certain cases specified by the Act (r), her previous position of immunity from adverse legal proceedings.

Distinction between statutory and equitable separate property.

In considering the provisions of the Act, it will be necessary to bear in mind the distinction between statutory separate property, declared to be such by the Act, and separate property which does not owe its character as such to the Act, and therefore remains within the jurisdiction of courts of equity only. It appears that the former class alone carries with it the legal powers and privileges conferred by the Act; but it is apprehended that both classes are equally subject to the new liabilities, now imposed upon women, in respect of their separate property (s).

Statutory separate property.  
(1.) Wages and earnings of all married women, acquired after the passing of the Act; and investments thereof.

By section 1, it is enacted that the wages and earnings of any married woman, acquired or gained by her, after the passing of the Act, in any employment, occupation, or trade, in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and *all investments* of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married; and her receipts alone shall be a good discharge for such wages, earnings, money, and property (t).

(2.) Personality devolving on women

By section 7, it is enacted that where any woman, *married after the passing of the Act*, shall during her

(r) Sections 12, 13, and 14; *Sanger v. Sanger*, L. R. 11 Eq. 470. See also *re Heneage*, L. R. 9 Ch. App. 307; and especially *Hancocks v. Lablache*, 26 W. R. 402; 3 C. P. Div. 196.

(s) *Ibid.*

(t) *Lovell v. Newton*, 4 C. P. Div. 7.



marriage become entitled to any personal property as next of kin, or one of the next of kin, of an intestate, or to any sum of money, not exceeding two hundred pounds, under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use; and her receipts alone shall be a good discharge for the same.

married on or after August 9, 1870, "ab intestato;" and sums of money under any deed or will not exceeding £200.

By section 8, it is enacted that where any freehold, copyhold, or customary-hold property shall *descend* upon any woman married after the passing of the Act, as heiress or coheiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use; and her receipts alone shall be a good discharge for the same.

(3.) Rents and profits of real estate devolving "ab intestato" on women married on or after August 9, 1870.

By section 2, married women are enabled to invest their separate property, in savings' banks and Government annuities; by section 3, in the public funds (u); by section 4, in shares and debentures, *to which no liability is attached*, in any incorporated or joint-stock company; and by section 5, in similar shares in friendly and benefit societies duly registered. But, of course, the mere investment under these clauses of a fund not otherwise separate property, without the husband's consent, cannot give such fund the character of separate estate, so as to defeat or prejudice the husband's equities. And further, the rights of the husband's creditors are reserved, by section 6, against property fraudulently deposited or invested by him in his wife's name; and the creditors are enabled to follow such property as though the Act had not been passed.

(4.) Investments.

Husband's creditors.

---

(u) *In re Bartholomew's Estate*, 19 W. R. 95; *In re Butlin's Trusts*, 19 W. R. 241.

(5.) Life policies.

By section 10, a married woman may effect an insurance on her own or her husband's life to her separate use ; and similarly a married man may insure his own life, so as to create a trust for the separate use of his wife, according to the interest expressed on the face of the policy.

The Act gives a married woman a good *prima facie* legal title to all the above-mentioned classes of property, as her statutory separate property.

Questions between husband and wife.

Under section 9, a summary remedy is given to husband or wife, in all questions *between themselves* as to property declared by the Act to be the separate property of the wife, that is to say, either party may apply by summons or motion, without bill filed, or writ issued as in an action, to the Court of Chancery, or Chancery Division of the High Court, or to the County Court, irrespective of the value of the property in question.

Wife's right of action at law.

By section 11, it is enacted that a married woman may maintain an action *in her own name* for the recovery of any wages, earnings, money, and property *by the Act declared to be her separate property*, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed shall belong to her after marriage as her separate property, and she shall have *in her own name* the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof, for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman ; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

By section 12, it was enacted that a husband should not, by reason of any marriage which should take place after the Act had come into operation, be liable for the debts of his wife contracted before marriage; but the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy, such debts, as if she had continued unmarried. The defect of this section was, that it was left at the option of the husband and wife whether there should be any reservation of separate property on the marriage, and consequently they might by omitting to make such reservation, whether collusively or innocently, defeat the only remedy left to her ante-nuptial creditors by the Act. This defect has, however, been remedied by the Married Women's Property Amendment Act, 1874 (v), which (as regards all marriages taking effect after the 30th July 1874) repeals that portion of section 12 of the Act of 1870 which took away the husband's liability for his wife's debts contracted before marriage, and enacts that husband and wife may be jointly sued for any such debts, and further enacts that in respect of all such debts, and likewise in respect of damages resulting from the wife's torts committed before marriage, the husband shall be liable for the said debts and damages respectively to the extent only of the assets afterwards in the Act specified, that is to say, to the extent of the following assets:—

Wife's liability for her debts contracted before marriage.

Extent of husband's liability for same debts under Married Women's Property Amendment Act, 1874.

- (1.) The value of the personal estate in possession of the wife which shall have vested in the husband ;
- (2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession ;
- (3.) The value of the chattels real of the wife which shall have vested in the husband and wife ;

(v) 37 & 38 Vict., c. 50 ; and see *West of England and South Wales Bank, Ex parte Hatcher*, W. N. 1879, p. 136.

(4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or which with reasonable diligence he might have received ;

(5.) The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of the marriage may have transferred to him or any other person ; and,

(6.) The value of every property, real or personal, which the wife, in contemplation of her marriage with the husband, shall with his consent have transferred to any other person with the view of defeating or delaying her existing creditors (*w*).

For maintenance of husband and children.

By section 13 of the Act of 1870, a married woman possessed of separate property is made liable for the maintenance of a pauper husband ; and by section 14, she must maintain her children, subject, however, to the father's primary liability to maintain them.

## SECTION II.—PIN-MONEY AND PARAPHERNALIA.

Pin-money.  
For wife's ornament and personal expenditure.

I. PIN-MONEY may be defined as a yearly allowance settled upon the wife before marriage, for the purchase of clothes or ornaments, or otherwise for her separate expenditure ; it is in order to deck her person suitably to the rank, and agreeably to the tastes, of her husband, who has accordingly an interest in its expenditure. It is a sum allowed for her personal expenses, in order to save a constant recurrence by the wife to the husband, upon every occasion of a milliner's bill or jeweller's account coming in—the jeweller's account, viz., not for the jewels, because that is a very different question, but for the repair and the wear and tear of trinkets—and for pocket-money, and things of that sort ; nor, of course, does it mean the carriage, and the

To save the constant recurrence of wife to husband for trifling expenses.

---

(*w*) *London & Provincial Bank v. Bogle*, 7 Ch. Div. 773 ; see also Griffith's Married Women's Property Acts.

house, and the gardens, but the ordinary personal expenses (*x*). Gratuitous gifts, or payments from time to time, made to the wife by her husband after marriage, for the same purposes, are also considered as pin-money (*y*).

Bearing in mind the objects for which pin-money is apparently given, it seems to follow that it is in some respects very different from money set apart for the wife's sole and separate use during the coverture, excluding the *jus mariti*; but notwithstanding the difference of the objects, pin-money is in many (and these the legally most important) respects very similar indeed to separate estate, as will appear from a comparison of the doctrines regarding the separate estate explained in the preceding section, with the following propositions regarding pin-money, which appear to be authorised by the cases on the subject:—

Not like her separate estate in some few respects, but like it in most respects.

1. That when the wife permits her money to run into arrear for a considerable time, upon surviving her husband, she will only be permitted to claim arrears for one year prior to his death (*z*); for the very object of the provision being to enable the wife to deck her person suitably to her husband's rank, without having recourse to him continually for small sums of money, that object excludes the supposition that she may accumulate her pin-money while the expenses of her person, and the demands upon her pocket, for those things to which pin-money is applicable, have been otherwise defrayed by her husband (*a*).

She can claim only one year's arrears.

2. Where, however, it appears that the wife has

When she

---

(*x*) *Howard v. Digby*, 8 Bligh, N. S. 265.

(*y*) 2 Bright, H. & W. 288.

(*z*) *Aston v. Aston*, 1 Ves. Sr. 267; *Townshend v. Windham*, 2 Ves.

Sr. 7.

(*a*) *Howard v. Digby*, 8 Bligh, N. S. 269.

may claim all arrears. complained of her pin-money being paid short, and the husband tells her she will have it at last, she is held entitled to *all* arrears due at her husband's death (*b*).

She cannot claim arrears where he has provided her apparel, &c. 3. Where the husband has paid for all the wife's apparel, and provided for all her private expenses, she cannot claim for any arrears at the death of her husband, for this will be considered a satisfaction by the husband (*c*).

Wife's executors cannot claim even one year's arrears. 4. It seems to follow from the nature and purposes of pin-money, that the wife's executors have no claim against the husband or his estate, even for one year's arrears (*d*).

Paraphernalia include gifts to be worn as ornaments. II. PARAPHERNALIA (*e*).—The paraphernalia of the wife include such apparel and ornaments given to the wife as are suitable to her condition in life, and as are expressly given to be worn as ornaments of her person only (*f*).

Jewels given to the wife by her husband after marriage will, it seems, be considered her paraphernalia, where they are given her expressly for the purpose of wearing them, as befitting her station in life (*g*). But it would also appear that gifts from the husband to the wife may be made to her separate use, where they are given to her absolutely, and not merely to be worn as ornaments for her person (*h*).

---

(*b*) *Ridout v. Lewis*, 1 Atk. 269.

(*c*) *Thomas v. Bennet*, 2 P. W. 341; *Howard v. Digby*, 8 Bligh, N. S. 269.

(*d*) *Howard v. Digby*, 8 Bligh, N. S. 271.

(*e*) The word paraphernalia is derived from the Greek word *παραφέρνῃ*, i.e., property belonging to the wife over and above (*παρα*) the dower (*φέρνῃ*) which she brought to her husband.

(*f*) *Graham v. Londonderry*, 3 Atk. 394.

(*g*) *Jervoise v. Jervoise*, 17 Beav. 571; *Graham v. Londonderry*, 3 Atk. 394.

(*h*) *Graham v. Londonderry*, 3 Atk. 394; *Grant v. Grant*, 13 W. R. 1057.

Old family jewels, which have been handed down from father to son, do not constitute the paraphernalia of the wife; but she may, of course, acquire them by gift or bequest, in which latter case they would also belong to her for her separate use (*i*).

But not old family jewels.

The better opinion seems to be, that where articles such as ordinarily constitute paraphernalia are given to the wife, either before or after marriage, by a relative or friend, they will be considered as given to her separate use, in which case she takes them as a *feme sole* (*j*).

Nor gifts by a stranger before or after marriage.

The wife cannot dispose of her paraphernalia by gift or will during her husband's lifetime. But the husband may, by act *inter vivos*, during her life, dispose of her paraphernalia by sale or gift (*k*). He cannot, however, dispose of them by his will (*l*); but if he does so, and confers other benefits upon the wife by his will, she will be put to her election between her paraphernalia and any interest which she may take under the will (*m*). As the husband may dispose of his wife's paraphernalia in his lifetime, so they will be liable to his debts (*n*).

Wife cannot dispose of paraphernalia during husband's life. Husband cannot dispose of them by will.

Paraphernalia liable to his debts.

With respect to the equity of marshalling the assets in favour of the wife, where the husband dies indebted and her paraphernalia are taken by his creditors in satisfaction of their demands, after all the general personal estate is exhausted by the creditors, in the administration of assets, the widow's claim to her paraphernalia is preferred to general legacies, and it

Widow's claim to paraphernalia preferred to general legacies.

(*i*) *Jervoise v. Jervoise*, 17 Beav. 570.

(*j*) *Graham v. Londonderry*, 3 Atk. 394; *Lucas v. Lucas*, 1 Atk. 270; but see *Jervoise v. Jervoise*, 17 Beav. 571.

(*k*) *Seymore v. Tresilian*, 3 Atk. 358.

(*l*) *Ibid.*

(*m*) *Churchill v. Small*, 2 Kenyon, pt. 2, p. 6.

(*n*) *Campion v. Cotton*, 17 Ves. 273; and see 2 Ves. Sr. 7.

follows that she is entitled to marshal assets in all those cases in which a general legatee would have that right (o). In fact, as already stated in the chapter on "Marshalling of Assets," the wife as regards her paraphernalia has the first claim after simple contract creditors.

On partial alienation by husband, must be redeemed out of the personal assets, as against legatees.

If the alienation by the husband, in his lifetime, of the wife's paraphernalia be not absolute, but only by way of pledge or mortgage, his wife surviving him will be entitled to have them redeemed out of his personal estate, even to the prejudice of legatees, her right being anterior to them, and to be preferred to their claims, which are merely voluntary (p).

### SECTION III.—THE WIFE'S EQUITY TO A SETTLEMENT AND HER RIGHT OF SURVIVORSHIP.

Marriage a gift of wife's personal property to husband—both at law and in equity.

Marriage is a gift to the husband of all the personal property, other than separate property, to which the wife is entitled at the time of the marriage, or to which she may afterwards become entitled, subject only to the condition (as regards any chose in action) of his reducing it into possession during the coverture; and no distinction exists, in this respect, between property to which the wife is entitled in equity and property to which she is entitled at law. *Primâ facie*, then, the wife's property, whether at law or in equity, becomes the husband's. On what grounds, therefore, is the interference of equity derogating from the husband's legal rights, and compelling him to make a settlement on his wife, to be supported?

Her equity to a settlement does not de-

Firstly, it is safe to assert that her equity to a settlement does not depend on any right of property in

(o) *Tipping v. Tipping*, 1 P. W. 729; *Snelson v. Corbet*, 3 Atk. 369; see also p. 289, *supra*.

(p) *Graham v. Londonderry*, 3 Atk. 393.



her, and this position will appear the more clear when it is considered to what limitations her equity is subject. The amount is discretionary in the court, and if the wife insists upon it, she must claim it for herself and her children, and not for herself alone,—limitations which are wholly inconsistent with a right of property in her (q).

pend on a right of property in her.

The right being thus independent of property, there seems to be no ground, Secondly, on which it can rest, except the control which courts of equity exercise over property falling under their dominion. It is, in truth, the mere creature of equity deduced originally, where the husband sued, from the rule, that he who comes into equity must do equity; that is, the court refused its aid to the plaintiff-husband in seeking to acquire what the law would have given him if the court of common law had had jurisdiction in the matter; and as the court of law had no jurisdiction, he returned into the Court of Equity, which consented to lend him its aid only upon certain conditions which the court considered he ought to comply with, although the subject of the condition should be one which the court would not have otherwise enforced (r). And inasmuch as a father would not have given his daughter in marriage without insisting on some provision being made for her and her children, so a court of equity standing, vaguely speaking, *in loco parentis* towards all married women, will not allow the husband to come into a court of equity for the fortune of his wife without his first making a provision for her.

Her equity arises from the maxim, "He who seeks equity must do equity."

The court imposes conditions on the husband coming as plaintiff.

The principle, after having been once thus far recognised where the husband was plaintiff, was next enforced where the assignees of a bankrupt or insolvent husband were plaintiffs, upon the ground that the

Principle extended to the husband's general assignees.

(q) *Osborne v. Morgan*, 9 Hare, 434.

(r) *Sturgis v. Champneys*, 5 My. & Cr. 102.

Then to particular assignees for value.

Wife permitted to assert her right as plaintiff.

The general principle upon which the court acts in decreeing or not to married women a settlement.

assignees, claiming in right of the husband, should be aided only upon the same conditions as the court would have imposed upon the husband himself (s). Subsequently the same rule was held to apply as against an assignee of the husband for valuable consideration being plaintiff. "It would be whimsical, then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in. The guard of the court upon the wife's interest would be very singular if the husband, not being entitled at law, must assign it for a valuable consideration to another person, who would be entitled in equity" (t). Eventually, the principle was extended to suits instituted by the wife herself, and in *Elibank v. Montolieu* (u) it was decided that as to personalty, where it was perfectly clear that the subject-matter in controversy must be determined and decided upon and distributed in the Court of Chancery, there the wife might come to assert her equity, and need not wait until the defendant came into court to seek the court's aid in the matter.

Before proceeding to enumerate the varieties of property out of, or in respect of which, the wife is entitled to her equity, it will be convenient and serviceable to the student to express in an abstract form the guiding principles governing the Court of Equity in the matter. There being, first of all, a possibility of the husband getting hold of and keeping (by virtue of the right which the law gives to him as husband) the property in question of the wife, the court next inquires whether the wife, if she survived her husband, would or would not take the entirety of the property by virtue of her right of survivorship hereinafter explained; and if

(s) *Oswell v. Probert*, 2 Ves. Jr. 682.

(t) *Macaulay v. Philips*, 4 Ves. 19; *Scott v. Spashett*, 3 Mac. & G. 599.

(u) 1 L. C. 464.

(but only if) there is a possibility of the husband getting and keeping the property wholly, *and* the wife would not be entitled to the entirety thereof by survivorship, then there being this danger to the wife, and such danger being also reasonably imminent, the court assumes jurisdiction to inquire into the question of the wife's equity to a settlement out of the property that is so in danger: And upon this inquiry, the court inquires principally, whether the property in question is or not legal, or is or not equitable; and then generally the court answers—(1.) If the property is *equitable*, that the wife is entitled to an equity out of it (there being no other sufficient reasons for denying her the equity); and (2.) If the property is *legal*, that the wife is *not* entitled to any equity out of it (there being no other sufficient reasons for decreeing to her the equity). In brief, the court asks,—Firstly, Would the husband take *all*? and if the answer is, “Yes;” then, secondly, Is the property *legal* or is it *equitable*?

We may now proceed to apply these principles:

The general principle illustrated,—

(1.) As to the husband's power over his wife's leaseholds, and her equity to a settlement out of them against him and his assignees, the rule varies according as the husband's title, in her right, is legal or is equitable. In *Hanson v. Keating (v)*, where the husband and wife assigned by way of mortgage the *equitable* interest of the husband in right of his wife, in a term of years, and the mortgagee filed his bill against the husband, the wife, and the trustee of the legal estate, for a foreclosure and assignment of the term, it was held that the wife was entitled to a provision for life by way of settlement out of the mortgaged premises.

(1.) Wife's term, or leasehold interests.

(a.) Being equitable,—wife has an equity.

Where, however, a similar assignment took place of the wife's *legal* interest in leaseholds, it was held

(b.) Being legal,—wife has no equity.

that on the mortgagee filing a bill for foreclosure the wife had no equity to a settlement out of them, inasmuch as a purchaser took a good legal title from the husband (*w*).

(2.) Pure personal property.

(a.) Being legal,—wife has no equity.  
(b.) Being equitable,—

(2.) As regards the pure personal property of the wife, there is no doubt at all that, if that property is *legal*, the wife has no equity; on the other hand, if that property is *equitable*, there is just as little doubt that the wife has an equity out of it, provided she is entitled to the absolute interest in the property, and this against the husband and everybody claiming under him (*x*).

(aa.) And interest being an absolute interest,—wife has an equity.

But an important distinction has been made between cases in which the wife takes an *absolute* interest, and those in which she takes a *life-interest* only. As to the former, “it is now clearly settled that a purchaser from the husband of the wife’s equitable chose in action, to the corpus of which she is entitled, is in no better situation than the husband himself. On what grounds is it that the court does not apply the same rule where the subject-matter of the sale is an equitable life-interest only? I take them to be these:—Where the interest sought to be recovered through the aid of the court is an absolute equitable interest, the court, though enforcing against the husband what is called the wife’s equity, acts, in truth, for the benefit, and with a view to the interests not of her only, but also of her children. It deals with the fund in analogy to what a prudent parent would probably have done in giving a portion to his daughter, and the doctrine having been acted on for centuries, . . . *no purchaser from the husband can be deceived or mistaken as to how*

(*w*) *Hill v. Edmonds*, 5 De G. & Sm. 603; *Hatchell v. Elggeso*, 1 Ir. Ch. R. 215; and see *Pigott v. Pigott*, L. R. 4 Eq. 549.

(*x*) *Scott v. Spashett*, 3 Mac. & G. 603; *Beresford v. Hobson*, 1 Madd. 362; *Burdon v. Dean*, 2 Ves. Jr. 608.

*his rights will be dealt with here.* There is no doubt or ambiguity. He knows that the fund is the fund of a married woman; and that relation alone, without more, gives rise to her rights, and, through her, to the rights of her children in this court. If therefore he by contract puts himself in the place of the husband, he cannot complain that he should be in no better position than the person to whose rights he succeeds.

“The case is not the same where the court has to deal with a mere life-interest. No provision in such a case can be made for the children. The question, then, is one exclusively between the husband and the wife. In directing a settlement of a wife’s fortune, the court never (assuming that there is no misconduct in the husband) deprives him of the income of the fund.”

(bb.) But if interest is for life only,—then the wife has or has not an equity, inversely as the husband is or is not maintaining her.

(1.) “It is his duty to maintain his wife, and to enable him to do so, this court follows the course of the common law, and gives him a right to what, but for the marriage, would be the natural fund for supporting the wife.”

That is to say,—(1.) Husband takes the fund as long as he maintains the wife.

“By the marriage, and the duty thereby entered into of maintaining her, he becomes a purchaser of what is reasonably and naturally applicable towards enabling him to perform his duty.

(2.) “It is true, that if he fails in the discharge of that duty, if he deserts his wife and ceases to maintain her, this court will not help him to get at the fund which he can only reach through its process, without securing for the wife a portion of his income. But this is done not by reason only of the relation resulting from the marriage, but because the husband has failed to perform the duties under which he had brought himself; it is an equity enforced in favour of the wife arising from the husband’s misconduct.”

(2.) Her equity out of the fund arises on his failure to maintain her.

(3.) Purchaser of life estate not bound to inquire as to whether the husband is maintaining her.

(3.) "Now to involve third persons in questions as to how far the husband has or has not duly maintained his wife, would, it has been thought, be inexpedient, and might give rise to discussions irritating and unseemly. It may happen that a husband duly maintaining his wife may, for their common advantage, reasonably sell her life income, and it would be strange that the purchaser's title should be defeated by the subsequent misconduct of the husband in not maintaining his wife" (y).

In accordance with the above principles, it has been held that a married woman, whose husband has deserted her (z), or does not maintain her (a), or has become bankrupt (b), is not entitled to a settlement out of property in which she has an equitable life-interest, as against a person to whom her husband had assigned it for value *previous* to his desertion or bankruptcy. Nor has she any equity to a settlement out of her life-interest where she is living with and is maintained by her husband, though, as she alleges, in a manner very inadequate to her fortune (c).

(4.) Distinction between a particular and a general assignee.

(4.) A distinction has, however, been taken between the position of a particular assignee for value of the husband, and his general assignee or trustee in bankruptcy. The reason for this difference is thus explained by Leach, V.-C.:—"Where an equitable interest is given to the wife, *for her life only*, this court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is

---

(y) *Tidd v. Lister*, 3 De G. M. & G. 869, 870.

(z) *Wright v. Morley*, 11 Ves. 12.

(a) *Tidd v. Lister*, 10 Hare, 140.

(b) *Elliott v. Cordell*, 5 Mad. 149.

(c) *Vaughan v. Buck*, 13 Sim. 404.

the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and if the husband becomes bankrupt, . . . this court will fasten the same obligation of maintaining the wife out of the property of this description which devolves by law upon the general assignee, for *when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife*; but the same principle does not necessarily apply to a particular assignee for a valuable consideration who purchased this interest *when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife* " (d).

The trustee in bankruptcy or general assignee always has notice, *ex hypothesi*, that husband incapable of maintaining his wife, and neglecting to do so, while a particular assignee may have no such notice, and is not bound to inquire.

However, where the wife is held entitled to an equity out of her life-interest in personalty, she is not entitled to any settlement out of arrears of income accrued due before she has set up any claim thereto, but such arrears will be paid to the husband or his assignees (e).

No equity to arrears of income.

(3.) As to the realty of a married woman, if that is realty of inheritance either in fee-simple or in fee-tail, it is clear that the question of the wife's equity to a settlement out of that realty (as regards the fee-simple or fee-tail estate therein) does not arise, because there is no possibility of the husband taking or keeping the inheritance adversely to his wife. In this case, whether the estate be legal or equitable, the wife has no equity, because she has something better, namely, the whole indefeasible inheritance.

(3.) Realty,—  
(a.) Of inheritance :  
(aa.) Being legal,—  
(bb.) Being equitable,—  
the wife has no equity in either case.

Thus, in the *Life Association of Scotland v. Siddal* (f),

(d) *Elliott v. Cordell*, 5 Mad. 149.

(e) *Re Carr's Trusts*, L. R. 12 Eq. 609; 19 W. R. 675.

(f) 3 De G. F. & J. 271.

it was held that, where a married woman was equitable tenant in tail of land to be purchased with a sum of trust-money, which she had purported to join with her husband in mortgaging, she was not entitled to a settlement out of the capital. Turner, L. J., said :—  
 “ Whatever may be the right of a married woman to have a provision made for her out of *the income* of an estate of which she is equitable tenant in tail, it is not, as I apprehend, according to the course of the court, or indeed in its power, to order a settlement to be made of *the estate or land* to be purchased. The equity for a settlement attaches on *what the husband takes in right of the wife*, and not *what the wife takes in her own right* [and which she can keep in spite of her husband]; and the estate tail being in the wife, I do not see\* what power this court can have to order a settlement of it to be made, or to render such a settlement, if made, binding and effectual against the wife.”

Because, she has something better.

(b.) Life-estate in realty,—  
 (aa.) Being legal,—wife has no equity.  
 (bb.) Being equitable,—wife has an equity, at least if husband not maintaining her.

On the other hand, in *Sturgis v. Champneys* (g), the *provisional assignee* of an insolvent debtor, whose wife was entitled *for life* to real property, was obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being outstanding in mortgagees. It was argued that the court would not secure a provision for a wife unless the property were such as to be a proper subject of equity; and that in this case Lady Champneys had a legal estate for life, and that it was only by the accident of the prior

---

\* The judge now speaks satirically :—Of course, if the wife could keep (and she could keep) the whole fee-tail at law, what occasion was there for the Court of Equity, or what power in that court, to take the whole away, and give her back a half or two-thirds on the pretext of protecting her? The judgment has frequently been wholly misunderstood from not perceiving the Lord Justice's satire.

(g) 5 My. & Cr. 97; *Taunton v. Morris*, 8 Ch. Div. 453; W. N. 1879, p. 30.



encumbrance being still existing, and the legal estate outstanding, that the plaintiff was compelled to come into equity. But Lord Cottenham held the wife entitled to a settlement out of the rents of her life-estate. After an examination of the cases on the subject, his Lordship said :—"From these authorities, and many others which recognise the same principle, it appears that the equity which this court administers in securing a provision and maintenance for the wife is founded upon the well-known rule of compelling a party who seeks equity to do equity; and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life-estates of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. *If the life-estate be attainable by the husband or his assignee at law, the severity of the law must prevail*; but if it cannot be reached otherwise than by the interposition of this court, equity, though it follows the law, and therefore gives to the husband or his assignee the life-estate of the wife, yet withholds its assistance for that purpose until it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle, the ordinary interposition of this court in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a plaintiff; and if such be the principle, what difference can it make when the assignees of the husband are applying to this court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior legal trust-estate?"

The wife may as plaintiff claim a settlement out of her equitable life estate in realty.

Legal freehold made equitable by the existence of a jointure term.

Wife's equity defeated by her alienation.

And the rule acted upon in the case of *Elibank v. Montolieu*, as to personalty, is equally applicable to a life-estate in realty being equitable; that is to say, the wife will also be entitled to a settlement where she is plaintiff, and asks for the aid of the court to settle her equitable life-estate upon her, which the husband or his assignee could not render available without resorting to equity. Thus in *Wortham v. Pemberton* (*h*), the facts of the case were as follows:—Miss W. was tenant in tail of an estate *subject to a jointure*, payable to Mrs. H., *secured by a term of years*, there being a proviso for cesser of the term on the decease of Mrs. H. Miss W. married Mr. N., who had persuaded her to elope with him, and had been imprisoned for the abduction. It was held that she was entitled to her equity to a settlement out of her equitable life-estate in the estate-tail, that life-estate being the substantial extent of her interest so long as the estate-tail remained unbarred. Knight Bruce, V.-C., said:—“Although she and her husband, or he in her right, may have the immediate legal freehold, there is a legal title which prevents the enjoyment except by means of a court of equity, and renders the title to the rents equitable *so long as the term lasts*; and it appears to me that the plaintiff is entitled to a settlement out of the rents during the joint lives of herself and her husband, *or until the determination of the term*.” After further discussion, it was held that the settlement could not be made beyond the jointure term, *i.e.*, beyond the life of Mrs. H. (*i*); because, of course, upon the cesser of that term, the life-estate became a *legal* life-estate.

Inasmuch as alienation by the wife will defeat her equity to a settlement, it becomes necessary to consider in what ways a married woman may validly dispose of

(*h*) 1 De G. & Sm. 644.

(*i*) But see the remarks of Westbury, L. C., in *Gleaves v. Paine*, 1 De G. Jo. & Sm. 93; Dart's V. & P. 529.

property, out of which she would otherwise be entitled to claim her equity, so as to preclude herself from afterwards claiming that equity.

1. In realty. Under 3 & 4 Will. IV., c. 74 (the Act for the Abolition of Fines and Recoveries), and 8 & 9 Vict., c. 106, s. 6, a married woman may dispose of her estates of freehold (and, *semble*, even of leasehold tenure), and may also release or assign any sum of money charged on lands, or the produce of land directed to be sold, whether her interest be in possession or reversion (*j*), by a deed duly acknowledged by her, and executed with the concurrence of her husband, in the manner provided by the first-mentioned Act (*k*). She may also alienate her copyholds by surrender, jointly with her husband, on being separately examined as to her free consent by the steward or his deputy (*l*).

1. Interests in realty.

2. In personalty. A married woman's interests in personal estate, so far as they are estates in possession, vesting in her husband on marriage, her power of disposition over them is a question which does not arise, but her husband may solely dispose of them, subject only to her establishing, if she is able, her equity to a settlement out of them; and so far as they are estates in reversion, her power of disposition over them is in abeyance during the coverture, as is (in effect also) her husband's power of disposition over them, excepting only in certain cases in which, as falling under Malins's Act, 20 & 21 Vict., c. 57 (*m*), she may, with the concurrence of her husband, and by deed acknowledged, dispose of same. These excepted cases will be hereafter explained. Of course, other

2. Interests in personalty.

(*j*) *Tuer v. Turner*, 20 Beav. 560; *Briggs v. Chamberlain*, 11 Hare, 69.

(*k*) 3 & 4 Will. IV., c. 75, 77, ss. 79.

(*l*) 1 Watk. Cop. 63.

(*m*) *Post*, p. 388.

exceptions have also arisen under the Married Women's Property Acts, 1870 and 1874, above explained.

Wife's choses in action belong to husband if he reduce them into possession.

As to the nature and extent of the husband's interest in and power over the wife's choses in action, the common law (apart from statute) says, that marriage is only a qualified gift to the husband of the wife's choses in action, viz., a gift to him only upon condition that, or if, he reduce them into possession during (in effect) his life; so that if he dies before his wife, and without having reduced such property into possession, she, and not his personal representatives, will be entitled to the property. This reduction into possession is (so far as regards the pure personal estate of the wife) a necessary and indispensable preliminary to the husband's either having in himself, or being able to convey to another, any assured right of property in respect of such personal estate; although as regards the chattels real of the wife, we have seen that a previous reduction thereof into his possession is not a necessary preliminary to the husband's power of disposition over them (*n*).

Wife surviving her husband takes her reversionary interests which he has not reduced into possession.

In accordance with these principles, in *Purdew v. Jackson* (*o*), where a husband and wife, by deed executed by both, purported to assign to a purchaser for valuable consideration a fund in which the wife had a vested estate in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlived the husband, it was decided that the wife was entitled by right of survivorship, and notwithstanding her concurrence in the assignment to claim the whole of her share of the fund against such particular assignee for valuable consideration. "I still continue of opinion," said the Master of the Rolls, "that all assignments

Assignee can take no more

---

(*n*) *Purdew v. Jackson*, 1 Russ. 66½; *Donne v. Hart*, 2 Russ. & My. 363; *Duberley v. Day*, 16 Beav. 33; and see pp. 344, 345, *supra*.  
 (*o*) 1 Russ. 1.

made by the husband of the wife's outstanding personal chattels, which are not or cannot be then reduced into possession, . . . pass only the interest which the husband has, subject to the wife's legal right by survivorship" (p). than the husband has to give.

It was further decided before the passing of Malins's Act, 20 & 21 Vict., c. 57, with regard to the wife's reversionary interests, that the court had not even the power of taking the wife's consent to part with them. Court had not power to take wife's consent to part with her reversionary interest. "If the wife by her consent could pass a remainder or reversion in personal property to the husband, she would part not only with a future possible equity, but with her chance of possessing the whole property by surviving her husband; and to give this effect to her consent would make it analogous to a fine at law, with respect to real estate, a principle always disclaimed in a court of equity. A court of equity interferes to protect the property of the wife against the legal rights of the husband, and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property which he can by no means acquire at law" (q). For she would lose a future possible equity and her chance of survivorship.

It has been held that a claim by the wife for a settlement out of her reversionary interest in property, *so long as it continues reversionary*, cannot be supported; on the ground that a court of equity only deals with interests in possession, and that it is not until the property comes to be distributed, that in ordinary cases the court enforces obligations attaching upon the property, otherwise than by contract. The wife's right to a settlement out of that property which the husband at law would, if he could, take possession She has no equity out of reversionary interest so long as reversionary. It is an obli-

---

(p) *Elliott v. Cordell*, 5 Mad. 149; *Stanton v. Hall*, 2 Russ. & My. 175, 182; *Re Duffy's Trusts*, 28 Beav. 386.

(q) *Pickard v. Roberts*, 3 Mad. 386; *Purdew v. Jackson*, 1 Russ. 56.

gation fastened, not on the property, but on the right to receive it.

of, in her right, is an obligation which a court of equity fastens not upon the property, but upon the right to receive it; in fine, *the wife's equity arises upon the husband's legal right to present possession*; and that, of course, can only apply when the remainder or reversion has ceased to be such, and the property has fallen into possession (r), or but for the pendency of an administration action would have been in possession (s). Or, in the language of this present book, there is no danger of the husband getting at such property, and therefore no foundation for an equity to a settlement out of it, so long as it is in its reversionary condition.

Malins's Act,  
20 & 21 Vict.,  
c. 57.

*Feme covert's*  
interests in  
personalty,—  
(a.) Being in  
reversion.

(b.) Being in  
possession.

By Malins's Act (t) every married woman may, with the concurrence of her husband, by deed acknowledged in the manner required by the Fines and Recoveries Act (u), dispose of *every future or reversionary interest*, vested or contingent, belonging to such married woman, or her husband in her right, *in any personal estate* to which she shall be entitled under any instrument (except her own marriage settlement), *made after the 31st December 1857*; she may also release or extinguish any power in regard to any such personal estate, and also release and extinguish her equity to a settlement out of *her personal property in possession* under any such instrument as aforesaid. But nothing therein contained is to extend to any reversionary interest to which she shall become entitled under any instrument by which she shall be restrained from alienating or affecting the same. And the powers of disposition given by the Act to a married woman shall not enable her to dispose of any interest in personal estate settled on her by any settlement or agreement for a settlement made on the occasion of her own marriage.

(r) *Osborn v. Morgan*, 9 Hare, 434.

(s) *Robinson v. Robinson*, W. N. 1879, p. 100.

(t) 20 & 21 Vict., c. 57.

(u) 3 & 4 Will. IV., c. 73.

If the wife should be entitled to any chose in action, whether legal or equitable, of a reversionary nature, not within the above-mentioned Act, the effect of an assignment by the husband will be different under different circumstances. For putting aside the Married Women's Property Acts of 1870 and 1874, it is certain, firstly, that the wife by herself cannot assign, for by the act of marriage she deprives herself of all power so to do; and, secondly, the husband can only assign to another the interest to which he may be entitled himself. Suppose, therefore, that the wife is entitled, on the death of A., a person now living, *to a sum of stock standing in the name of trustees*, and that her husband should purport to make an assignment of this reversionary interest to B., a purchaser; the benefit which will accrue to B., by virtue of the assignment, will vary, according as the husband, the wife, or A., the tenant for life, may die first. If the husband should die first, B. will lose his purchase, for the wife having survived her husband, will now, on the death of A., be entitled to the stock, which has never been reduced into the possession of her husband, or of B., his assignee (*v*). If A. should die first, B. may then obtain a transfer of the stock, if the trustees chose to transfer it to him (*w*); and if the wife should not have meanwhile taken steps to enforce her equity to a settlement (*x*). But if the trustees should refuse to transfer without the direction of the Court of Chancery, or if the wife should insist upon her right, B. can only take the fund after making such settlement upon her as the court may think fit. If, however, the wife should die first, then this chose in action, remaining unreduced into possession, will, like a legal chose in action, under the same circumstances, remain part of the wife's per-

As to cases not within the Act,—operation of the assignment.

Three possible ways in which the assignment may result,—

(1.) If husband die before reversion falls in, purchaser loses his purchase,—or draws a blank.

(2.) If reversion falls into possession, the husband and wife living, purchaser takes it subject to her equity,—or draws about a half, in general.

(3.) If wife die first, and then the reversion falls in, purchaser takes all,—or draws the winning card.

(*v*) *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65.

(*w*) *Wheeler v. Caryl*, Amb. 121, 122; *Moor v. Rycault*, Prec. Ch. 22.

(*x*) *Greedy v. Lavender*, 13 Benv. 62.

sonal estate; and the husband, on taking out administration to his wife (*y*), will be bound by his previous assignment. B. will accordingly in this single event obtain the whole fund, subject, however, to the wife's debts, if any (*z*).

What amounts to reduction into possession.

Mere assignment of a reversion is not a reduction into possession.

Husband's transfer of title-deeds, of which his wife was equitable mortgagee, not enough.

The question as to what amounts to a reduction into possession by the husband of his wife's choses in action, is one that generally will depend on the peculiar circumstances of each case. But it may be useful to mention some of the principles by which the court is guided in deciding this question. In *Hornsby v. Lee* (*a*), it was held that a mere assignment of a reversionary chose in action by the husband could not be regarded either as an actual or as a constructive reduction into possession by the husband (*b*). It is also now clearly established, that whether the husband dies in the lifetime of the person having a prior interest, whereby the chose in action *cannot*, as against the wife, be reduced into possession, or whether he survives, and dies before it is *actually* reduced into possession, the same result follows—the chose in action will survive to the wife (*c*). It has also been held that the transfer by a husband of title-deeds, of which his wife was equitable mortgagee, to secure a debt of his own, was not a reduction into possession so as to defeat the wife's right of survivorship (*d*). The test of reduction into possession of a sum of money was, in a recent case, declared to be, the right of the husband to maintain an action at law for the amount, as money had and received to his use (*e*).

(*y*) 1 Bright's H. and W. 41; *Betts v. Kimpton*, 2 B. and Ad. 273.

(*z*) 29 Car. II., c. 3, s. 25; Wms. Pers. Prop. 396.

(*a*) 2 Mad. 16.

(*b*) *Le Vasseur v. Scrutton*, 14 Sim. 116.

(*c*) *Ellison v. Elwin*, 13 Sim. 309; but see *Widgery v. Tepper*, L. R. 5 Ch. Div. 516.

(*d*) *Mitchelmore v. Mudge*, 2 Giff. 183.

(*e*) *Aitchison v. Dixon*, L. R. 10 Eq. 589; and see *Wollaston v. Berkeley*, L. R. 2 Ch. Div. 213, where husband and wife died contemporaneously; and *In re Barber, Dardier v. Chapman*, 11 Ch. Div. 442.



On the other hand, where the income of a married woman's life-estate had been ordered to be received, and applied by a receiver in a suit, in payment of her husband's incumbrances, it was held that arrears of income in the receiver's hands, which had not been paid as directed, were nevertheless, by the effect of the order, reduced into possession, so as to disentitle the wife surviving to such arrears, because the receiver was to be deemed in the nature of an agent for the person entitled by virtue of the order for appropriation (*f*). And of course, payment to an agent of the husband is a reduction into possession to the extent of that payment (*g*).

Order of court to pay wife's income into a receiver's hands is a reduction into possession.

It has been already observed that the wife's equity, at least in cases where she takes an absolute interest, is not for herself only, but for herself and her children, there being no instance where the settlement has not been made in favour of the children at the same time; and though the wife may waive or abandon her equity, and thus prevent her children obtaining any benefit from it, yet if she claims it for herself, the court requires the benefit to be extended to her children; her equity and the equity of the children are treated as one equity, to be enforced or not, at her option (*h*). In no case are the children permitted to assert an independent equity; for in all cases the equity of the wife is personal, and the court acknowledges no original title in the children, who can claim only that provision which the wife thinks fit to secure for herself and them; and if the wife consent that the husband shall receive the whole property, the children are deprived of all provision out of it.

Settlement, if made, must be on wife and children. Though she may waive it, and thus deprive her children.

(*f*) *Tidd v. Lister*, 2 W. R. 184.

(*g*) *In re Barber, Dardier v. Chapman*, W. N. 1879, 86.

(*h*) *De la Garde v. Lempriere*, 6 Beav. 344.

When the right of children becomes indefeasible.

The inquiry now arises,—What is sufficient to create a title in the children. It has been observed that the wife's equity does not depend on the right of property in her, nor does it create a trust in her favour upon the property. "It is only a right to require that a trust shall be created for her, for the benefit of herself and her children. Before the property is impressed with a trust in her favour, it is necessary that some action should have been taken by her. What action is necessary upon her part to raise a trust, or rather, how far that action must have been carried in order to raise a trust, is the question; but some action must have been taken by her and carried to some certain point, otherwise no trust exists. If the property is in the hands of trustees, it is not enough that she should give them notice, in however formal and regular a manner, that she demands a settlement. Notwithstanding any such notice, the trustees may with impunity hand over the property to the husband. Nor can she enforce a settlement for the benefit of herself alone; it must be, if at all, for the benefit of her children, as well as herself. And yet if she has carried her action far enough to establish a trust for herself and her children, she may at any time before the *settlement is completed*, waive and defeat it not only as to her own interests, but also as to the interests of her children" (i). Now the following points, with reference to this doctrine, are well established :—

(a.) Where wife lives,—upon complete execution of settlement.

(b.) Where wife dies,—upon decree made, and not sooner.

1. That if the wife die before the bill is filed, giving to the court a jurisdiction or dominion over the fund, the children have no right to require a settlement (j).

If wife dies

2. That if the wife die, even after she has filed a bill

(i) *Wallace v. Auldjo*, 2 Drew. & Sm. 222.

(j) *Scriven v. Tapley*, 2 Eden, 337.

for a settlement, but before decree, her children cannot sustain a bill to have a settlement made on them (*k*). before decree, children have no right.

The general principle of the court is, that if in any ordinary case a person files a bill to assert any right to property, or to enforce any trust, his right is not created by the decree, any more than it is created by the filing of the bill. The decree only decides, or rather declares, what his right was at the time of, and before the filing of the bill. But these principles cannot safely be applied to questions arising with reference to a wife's equity to a settlement. "It is to be recollected, that when a woman becomes entitled to a certain property absolutely, say a share of property under a will, . . . what she becomes entitled to at that time (that is, by virtue of the will before anything done) is not a trust in equity in the sense of a trust or right of property—the property all belongs at law and in equity *prima facie* to the husband. But what she becomes entitled to is this—that notwithstanding the marital right, against that right, she has a right to take some action, to do something, or to have something done for her, which shall establish a trust upon that property, in her favour. That is the nature of what is called the wife's equity to a settlement, before anything has been done upon it. And therefore, to reason about such a right as that, as you would about the case of a person who has already got a right of property or a trust actually created, . . . is reasoning in a manner which has been deprecated as dangerous."

3. That if a decree or order has been made by the court, referring it to the Master, under the old practice, or to a Judge in Chambers, under the new practice, to Right of children as against husband arises on decree.

---

(*k*) *De la Garde v. Lempriere*, 6 Beav. 344; *Lloyd v. Mason*, 5 Hare, 149; *Lloyd v. Williams*, 1 Mad. 450. And consider effect of *Pitzgerald v. Chapman*, L. R. 1 Ch. Div. 563; *Burton v. Sturgeon*, L. R. 2 Ch. Div. 318.

approve a proper settlement, and the wife dies before anything further is done, the children are entitled to the benefit of that decree or order, and may file a bill to enforce such settlement, as the wife, if still living, would have been entitled to (*l*). And, *semble*, a summons to revive and proceed with the decree would be sufficient now (*m*).

Right of children may arise out of contract by father.

Wife may also after such contract but before execution of settlement (just as on judicial decree) waive her settlement, and so defeat her children.

4. The children's right to have a settlement executed after the death of their mother, who has claimed her equity to a settlement, also arises where there is during the marriage a contract by the father, independently of judicial decree, to make a settlement of his wife's property (*n*). Yet, after such a contract, just as after judicial decree, the wife, if living, may at any time before the *execution* of the settlement, waive her equity, and altogether defeat her children (*o*). In the words of Wigram, V.-C. (*p*), "There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the husband is bound, the children are certainly entitled."

What will defeat her right to a settlement.

The wife's right to a settlement, besides being voluntarily waived by her, may be defeated adversely to her by various causes, viz. :—

(*r*.) By husband's receipt of the fund.

1. By the receipt by the husband or his assignees of the fund (*q*).

(*l*) *Wallace v. Auldjo*, 2 Drew. & Sm. 223; *Murray v. Elibank*, 1 L. C. 431.

(*m*) Judicature Acts, 1873-75, Order L., rule 1.

(*n*) *Lloyd v. Williams*, 1 Mad. 450; *De la Garde v. Lempriere*, 6 Beav. 344; *Wallace v. Auldjo*, 2 Drew. & Sm. 216; and 1 De G. Jo. & Sm. 643.

(*o*) *Murray v. Elibank*, 1 L. C. 479; *Macaulay v. Philips*, 4 Ves. 15; *Baldwin v. Baldwin*, 5 De G. & Sm. 319.

(*p*) *Lloyd v. Mason*, 5 Ha. 153.

(*q*) *Murray v. Elibank*, 1 L. C. 471.

2. Where the debts of the wife, contracted before marriage, for which her husband becomes liable, exceed in amount the fund to which he becomes entitled in her right (*r*); and similarly where the husband's debts to the estate out of which the wife's interest arises exceed the amount of such interest (*s*). (2.) Where the debts of wife or even of husband exceed the fund.

3. Where an adequate settlement has been made upon her (*t*); but not by an inadequate settlement, unless her right to a further settlement be barred by an express stipulation before marriage (*u*). (3.) By an adequate settlement.

4. Where she is living in adultery apart from her husband (*v*); but even then, her husband will not, it seems, *while he does not maintain her*, be entitled to receive the whole of her property (*w*). But where both husband and wife are living in adultery, it has been held that the wife may claim a settlement, upon the principle of setting off the one wrong against the other, whereby the wife is again at large (*x*). (4.) By her adultery unless husband also living in adultery.

5. By her fraudulent suppression of the fact of her coverture. Thus, where a woman, by a document purporting to bear date before, but in reality signed after, her marriage, affected to assign certain property to her husband, which he afterwards sold, it was held that, though there was evidence of coercion on the part of the husband, yet by her concurrence in his fraud, she had precluded herself from claiming her equity to a settlement *as against the purchaser* (*y*). (5.) By her fraud.

(*r*) *Bonner v. Bonner*, 17 Beav. 86; *Barnard v. Ford*, L. R. 4 Ch. App. 247.

(*s*) *Osborn v. Morgan*, 9 Ha. 432; *Knight v. Knight*, L. R. 18 Eq. 487.

(*t*) *In re Erskine's Trusts*, 1 K. & J. 302; *Spicer v. Spicer*, 24 Beav. 365; *Giacometti v. Prodgers*, L. R. 14 Eq. 253; 8 Ch. App. 338.

(*u*) *Salwey v. Salwey*, Amb. 692; *Garforth v. Bradley*, 2 Ves. Sr. 675.

(*v*) *Carr v. Eastbrooke*, 4 Ves. 146; *In re Lewin's Trust*, 20 Beav. 378.

(*w*) *Ball v. Montgomery*, 2 Ves. Jr. 191.

(*x*) *Greeley v. Lavender*, 13 Beav. 62.

(*y*) *In re Lush's Trusts*, L. R. 4 Ch. App. 591.

Amount of  
settlement.

(a.) When  
husband is  
solvent.

When the husband is solvent, the amount to be settled upon the wife and children is a matter which depends generally on the arrangement between the husband and wife, and if the husband being solvent refuses to make a settlement upon his wife, the court will not, because it cannot, so long as he supports her, prevent his taking the produce or interest of her property, but the court will in such a case retain the capital, so as to give the wife a chance of taking it by survivorship (z); and, of course, if the husband survive, he may insist upon the court paying out the entire capital to himself; in other words, a solvent husband may hold out against, and eventually beat the court. The question as to what amount should be settled upon the wife arises most frequently when the husband has become bankrupt. No general rule can be laid down. It is a matter purely within the discretion of the court, to be determined according to the circumstances and merits of the case (a). The court will take into consideration whether the wife has acquired any benefit out of the property of her husband (b); the conduct and circumstances of the husband (c); and the conduct of the wife (d).

(b.) When  
husband is  
insolvent.

Generally half  
is settled on  
her.

The rule in general, in the absence of special circumstances, is that one-half of the wife's property shall be settled upon herself and her children, and the remaining moiety shall go to her husband or his assignees (e).

---

(z) *Sleech v. Thorington*, 2 Ves. Sr. 561; *Atcheson v. Atcheson*, 11 Beav. 485.

(a) *Carter v. Taggart*, 1 De G. M. & G. 289; *Aubrey v. Brown*, 4 W. R. 425.

(b) *In re Erskine's Trusts*, 1 K. & J. 302; *Green v. Olte*, 1 Sim. & Stu. 250.

(c) *Marshall v. Fowler*, 16 Beav. 249; *Barrow v. Barrow*, 18 Beav. 529.

(d) *Barrow v. Barrow*, 5 De G. M. & G. 795; *Giacometti v. Prodgers*, L. R. 14 Eq. 253; 8 Ch. App. 338.

(e) *Dunkley v. Dunkley*, 2 De G. M. & G. 396; *In re Suggitt's Trusts*, L. R. 3 Ch. App. 215.

And in some cases, it has been held that the *whole* fund will be settled on her and the children; as where it is small, and barely sufficient for the maintenance of the wife and children (*f*); *e.g.*, where the husband having become bankrupt is not able to maintain his wife (*g*); or where the husband has deserted or behaved cruelly to his wife, and does not maintain her (*h*); or is a lunatic (*i*).

Sometimes the whole fund will be settled.

Since the extent of the wife's equity is, to have a settlement made for the benefit of herself and her children, the court will not interfere with the marital right further than is necessary to give effect to that equity. The ultimate limitation, therefore, in default of issue of the existing marriage, or of any future marriage or marriages of the wife, will be to the husband absolutely (*j*), whether or not he survive the wife (*k*).

Form of settlement.

As to the question, how far settlements made in consideration of the wife's equity to a settlement will be binding as against creditors, the following rules may be laid down:—

How far binding as against creditors of husband.

1. Where the husband has once reduced into possession the equitable choses in action of his wife, and then makes a voluntary settlement on his wife out of them, the question of the validity or invalidity of such settlement against creditors will, apart from statute, depend

If husband reduce her property into possession and then make a settlement, it must conform to 13 Eliz., c. 5.

(*f*) *In re Kincaid's Trusts*, 1 Drew. 326.

(*g*) *Scott v. Spashett*, 3 Mac. & G. 599; *Gardner v. Marshall*, 14 Sim. 575.

(*h*) *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Re Ford*, 32 Beav. 621.

(*i*) *In re Dixon's Trusts*, W. N. 1879, p. 57.

(*j*) *Oroston v. May*, L. R. 9 Eq. 404; 9 Ch. Div. 388; *In re Suggitt's Trusts*, L. R. 3 Ch. App. 215; *Spirett v. Willows*, L. R. 1 Ch. App. 520; *Oliver v. Oliver*, 10 Ch. Div. 765.

(*k*) *Walsh v. Wason*, L. R. 8 Ch. App. 482; *Cogan v. Duffield*, L. R. 2 Ch. Div. 44; *Gale v. Gale*, L. R. 6 Ch. Div. 144.

Valid if *bonâ fide*, though on a meritorious consideration.

upon the *bonâ fides* of the transaction. Also, if the husband, being largely indebted at the time, conveys property in trust for his wife and children, such a conveyance may be within, and void under, the statute 13 Eliz., c. 5, as against the husband's creditors (*l*). But as that statute only directs that no act whatsoever, done to *defraud* a creditor, shall be of any effect against that creditor, a *bonâ fide* settlement, where there is no imagination of fraud, or rather no fraud in point of actual fact, *not imagination*, will, even though voluntary (*m*), be supported as against the husband's creditors (*n*). By the Bankruptcy Act, 1869, it is enacted, that "a settlement made (by a trader), on or for the benefit of wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife," shall be good as against his assignees in bankruptcy (32 & 33 Vict., c. 71, s. 91).\*

Trader's settlement of wife's property under Bankruptcy Act, 1869.

If court decree the settlement, creditors are bound.

2. Where the court decrees a settlement upon the wife, "the court will support it as a good settlement for valuable consideration" (*o*).

Settlement by husband, on trustees refusing to part with the wife's property, also good.

3. Where the wife, after marriage, becomes entitled to property which the husband cannot touch without the aid of the court, and the trustees will not pay it without the husband making a settlement; and if the husband agrees to settle it, and do that which the court would decree, it is a good settlement against creditors (*p*).

(*l*) *Goldsmith v. Russell*, 5 De G. M. & G. 547.

(*m*) *Holmes v. Penney*, 3 K. & J. 90; *Sagitary v. Hide*, 2 Vern. 44.

(*n*) *Cadogan v. Kennett*, Cowp. 434; see *ante*, pp. 83, 84.

\* The reader should recur to the chapter on "Express Private Trusts," for a further exposition of these lastly mentioned matters.

(*o*) *Wheeler v. Caryl*, Amb. 121; *Simson v. Jones*, 2 Russ. & My. 365.

(*p*) *Wheeler v. Caryl*, Amb. 121, 122; *Moor v. Rycault*, Prec. Ch. 22; *In re Wray's Trusts*, 16 Jur. 1126.



SECTION IV.—SETTLEMENTS IN DEROGATION OF  
MARITAL RIGHTS.

It being a general rule of law and equity that a husband becomes entitled to the property of his wife on marriage, any alienation of property by her in fraudulent derogation of the marital rights will in equity be deemed null and void. In *Strathmore v. Bowes* (q), Lord Thurlow thus states the rule:—"A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *primâ facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during the course of a treaty of marriage* with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *primâ facie*, because affected with that fraud."

Wife must not commit a fraud on the marital right.

Conveyance by wife *primâ facie* good.

The cases decided on this subject support the following conclusions:—

1. If a woman entitled to property enters into a treaty for marriage, and *during the treaty represents to her intended husband* that she is so entitled; that upon the marriage he will become entitled *jure mariti*; and if *during the same treaty* she CLANDESTINELY conveys away the same property to a volunteer (r), or settles the property upon herself, in such a manner as to defeat the marital right, *and the concealment continues until the marriage takes place*, there can be no doubt but that a fraud is practised in such a case on the husband, and he is entitled to relief (s).

If during a treaty of marriage she alienates without husband's knowledge property to which she has represented herself entitled, it is fraudulent.

2. And not only is this principle applicable where the husband knew of the existence of her property, Same principle applicable if he did

(q) 1 L. C. 446.

(r) *Lance v. Norman*, 2 Ch. Rep. 79.

(s) *England v. Downes*, 2 Beav. 528.

not know her  
to be pos-  
sessed of such  
property.

but it has been extended much further; for in *Goddard v. Snow (t)*, a woman ten months before marriage, but after the commencement of that intimate acquaintance with her future husband which ripened into marriage, made a settlement of a sum of money *which he did not know her even to be possessed of*. The marriage took place, she concealing from him both her right to the money, and the existence of the settlement. Ten years after, on her death, it was held on a bill filed by the husband, that the settlement was void, as a fraud upon his marital rights (*u*).

Not fraudulent,  
if to a  
purchaser for  
valuable con-  
sideration  
without  
notice.

3. But when a woman about to marry, sells or conveys to a purchaser for valuable consideration, *without notice* of any intended derogation of the marital right, the sale or conveyance will be held good (*v*). It seems uncertain, however, whether if the purchaser for value *have notice*, the sale or conveyance will stand as against the husband (*w*).

Void, even  
though meri-  
torious, if  
secret.

4. It would seem that a clandestine settlement made by a woman pending her marriage, even if meritorious in its nature, as on the children of a former marriage, or on her illegitimate children, will be set aside as a fraud on the husband (*x*).

Marriage with  
notice of  
settlement  
binds hus-  
band.

5. If the intended husband is acquainted before his marriage with the fact of an assignment of property made by his intended wife, and nevertheless still thinks fit to marry her, he will be bound by it (*y*).

(*t*) 1 Russ. 485.

(*u*) *Downs v. Jennings*, 32 Beav. 290; *Taylor v. Pugh*, 1 Hare, 608.

(*v*) *Blanchet v. Foster*, 2 Ves. Sr. 264; *Lewellin v. Cobbold*, 1 Sm. & Giff. 376.

(*w*) *Ibid.*

(*x*) *Taylor v. Pugh*, 1 Hare, 608.

(*y*) *St. George v. Wake*, 1 My. & K. 610; *Wrigley v. Swainson*, 3 De G. & Sm. 458; *Slocombe v. Glubb*, 2 Bro. C. C. 545; but see *Nelson v. Stocker*, 4 De G. & Jo. 458.

6. In all the cases it has been held that the settlement to be invalidated must have been made without the husband's knowledge, *during the course of the treaty for marriage* WITH HIM. It has been accordingly held that a settlement made by a widow upon herself and the children of a former marriage was not fraudulent, because it was proved that the person she afterwards married was not at the time of the settlement "her THEN intended husband" (z). And in *Strathmore (Countess) v. Bowes* (a), the plaintiff pending a treaty of marriage with A., made a settlement of her property with his (A.'s) approbation; a few days after, B. gained her affections, and she threw over A., and married B., who had no notice of the settlement. It was, however, held good against B., as it could be no fraud on HIM, his brief period of courtship not having commenced at date.

A husband can only set aside a conveyance when made pending the marriage with him.

He must be her then intended husband.

7. Where the husband has before marriage seduced his wife, and thus rendered retirement from the marriage on her part extremely inconvenient, a settlement of her property made by the female before the marriage, although without her husband's knowledge, will, it seems, be supported (b).

If he has seduced her before marriage, her conveyance is good as against him.

---

(z) *England v. Downs*, 2 Beav. 531.

(a) 1 L. C. 446.

(b) *Taylor v. Pugh*, 1 Hare, 608.

## CHAPTER XXII.

## INFANTS.

Guardians. WHO may be the guardians (a) of an infant.

Father. 1. The father is the guardian by nature and nurture  
Mother. of his children during their infancy (b). But by 36  
Vict., c. 12, the court may grant the custody of infants  
under the age of 16 years to the mother, where that is  
for the benefit of the infant.

Testamentary 2. By 12 Car. II., c. 24, a power was conferred  
guardian. upon the father of appointing, even though a minor,  
by deed or will, a guardian for his legitimate children;  
and guardians so appointed are usually called testamen-  
tary guardians. But by the Wills Act (c), the power  
of making a will is taken from minors, but they may  
still appoint guardians for their children by deed.

A testamentary guardian is a trustee, and the  
Statute of Limitations is inapplicable to accounts as  
between him and his ward (d).

Guardian 3. The father may waive his natural rights of  
appointed by stranger standing in loco parentis. guardianship in favour of a stranger, whom he has  
permitted to put himself *in loco parentis* towards his  
child. Where, therefore, under these circumstances,  
the stranger has provided for the maintenance and

---

(a) For the various kinds of guardians ancient and modern, see  
Brown's Dictionary, title *Guardian*.

(b) *Wellesley v. Beaufort*, 2 Russ. 21.

(c) 1 Vict., c. 26.

(d) *Mathew v. Brisc*, 14 Beav. 341.

education of the child, and has appointed guardians, the father will be restrained in equity from asserting his parental rights *to the prejudice of his child's future interests* (e). And where a father, having waived his right to have his child educated in his own religion, appointed a testamentary guardian, and such guardian sought to have the child brought up in the father's religion, notwithstanding that his previous education had been in the mother's religion, the court by injunction restrained the guardian from applying for the delivery up of the child by the mother to himself, upon the ground *that it was for the infant's benefit* to have his education continue as it had previously gone on (f).

4. Guardian by appointment of the court. The Guardian appointed by court. origin of the jurisdiction of the Court of Chancery over infants has been a matter of much juridical discussion. The better opinion seems to be, that this jurisdiction has its just and rightful foundation Jurisdiction,—nature and origin of. in the prerogative of the Crown, flowing from its general power and duty as *parens patriae*, to protect those who have no other lawful protector (g). Partaking, as it does, more of the nature of a judicial administration of rights and duties, *in foro conscientiae*, than of strict executive authority, it would naturally follow, *ed ratione*, that it should be exercised in the Court of Chancery, as a branch of the *general jurisdiction* originally confided and delegated to that Court. Hence it is that this jurisdiction does not belong to the Lord Chancellor alone, as holder of the Great Seal and Keeper of the Royal conscience, but may be exercised by the Master of the Rolls also; and as in other cases where the Court of Chancery has a general jurisdiction, an appeal lies to the House of Lords from the decision of the Court of Chancery.

(e) *Powel v. Cleaver*, 2 Bro. C. C. 499.

(f) *Andrews v. Salt*, L. R. 8 Ch. 622. But see *In re Agar-Ellis*, 10 Ch. Div. 49.

(g) *De Manneville v. De Manneville*, 10 Ves. 63; and see *In re Johnsons Infants*, 8 Ch. Div. 1.

Infant becomes a ward of court when bill is filed relative to his estate.

Or an order made without suit.

If a bill be filed or action commenced relative to an infant's estate or person, the court acquires jurisdiction, and the infant, whether plaintiff or defendant, and even during the life of its father, or of its testamentary guardian, immediately becomes a ward of the court (*h*). And where without suit an order for maintenance had been made on summons in Chambers, it was held that the infant thereby became a ward of court (*i*). The jurisdiction may also be evoked on petition under the Custody of Infants Act, 1873 (*j*).

Infant must have property that court may exercise its jurisdiction usefully.

The Court of Chancery will appoint a suitable guardian to an infant where there is none other, or none other who will or can act; but, as a general rule, it will not do so unless where the infant has property, although it may do so under exceptional circumstances (*k*). "It is not, however," as observed by Lord Eldon, "from any want of jurisdiction that it does not act where it has no property of an infant, but from a want of the means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so—that is to say, by its having the means of applying property for the use and maintenance of the infant (*l*).

Jurisdiction over guardians.

In general, parents are intrusted with the custody and education of their children, on the natural presumption that the children will, by their parents, be properly treated, and due care be taken of their education, morals, and religion; but if the court has reasonable

---

(*h*) *Butler v. Freeman*, Amb. 303.

(*i*) *In re Graham*, L. R. 10 Eq. 530; *In re Hodges Settlement*, 3 K. and J. 213.

(*j*) 36 & 37 Vict., c. 12; see *In re Taylor*, L. R. 4 Ch. Div. 157.

(*k*) See *Re Spence*, 2 Phil. 247.

(*l*) *Wellesley v. Beaufort*, 2 Russ. 21.

grounds for believing that the children would not be properly treated, it "would interfere even with parents, upon the principle that *preventing* justice is preferable to *punishing* injustice" (*m*). But the court requires a strong case to be made out before it will interfere with a father's guardianship. Accordingly, where the father is insolvent (*n*), or his character and conduct are such as are likely to contaminate the morals of his children (*o*), or where he is endangering their property or neglecting their education (*p*), or is guilty of ill-treatment and cruelty to them (*q*), it is not a matter of course to take the father's guardianship away, but if the danger to the children is proximate and serious, then the custody of the children will be committed to a person to act as guardian (*r*).

When father loses his guardianship.

The guardian will be allowed to regulate the mode of, and to select the place for, the education of his ward, whose obedience will be enforced by the court (*s*). And the court will aid guardians in obtaining possession of the persons of their wards when they are detained from them.

Guardian selects mode and place of education of his ward.

If the guardian wishes to take his ward out of the jurisdiction of the court, and in some other cases where there is danger of injury to the ward's person or pro-

When guardian gives security.

(*m*) *Wellesley v. Beaufort*, 2 Russ. 21; *In re Besant*, 11 Ch. Div. 508.

(*n*) *Kiffin v. Kiffin*, 1 P. W. 705.

(*o*) *Shelley v. Westbrook*, Jac. 266 n.

(*p*) *Cruze v. Hunter*, 2 Cox, 242.

(*q*) *Whitfield v. Hales*, 12 Ves. 492.

(*r*) *Ex parte Mountford*, 15 Ves. 445; 36 Vict., c. 12.

(*s*) *Hall v. Hall*, 3 Atk. 721. See *Tremain's Case*, 1 Str. 167, where, "being an infant, he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge, and the court sent a messenger to carry him from Oxford to Cambridge; and upon returning to Oxford, there went another, *tam* to carry him to Cambridge, *quam* to keep him there."

perty, the court will always take security from the guardian before sanctioning his removal out of the jurisdiction (*t*).

Guardians must not change character of ward's property.

Except where necessary for his benefit.

Representa-

Guardians will not ordinarily be permitted to change the personal property of an infant into real property, or the real property into personalty. And this rule is founded on two considerations,—such a conversion may not only affect the rights of the infant himself, but it might also, if he should die under age, have affected at one time the rights of his representatives; for it must be remembered that, before the passing of the Wills Act (*u*), an infant might dispose of personal property before he attained the age of twenty-one, but could not devise real property until he had attained that age (*v*). But guardians may, under peculiar circumstances, and where it is manifestly for the benefit of the infant, change the nature of the estate; as for necessary expenses, such as repairs (*w*), or by payment of a certain sum out of the personal estate of the infant, in pursuance of a condition imposed on a devise of an estate to him (*x*); and the court will support their conduct if the act be such as the court would itself have done, under the like circumstances, by its own order (*y*). And although there is no equity in these cases of conversion between the representatives of the infant, nevertheless, the court has a regard to the circumstance that these representatives may be affected thereby, and it is always inclined to keep a strict hand over guardians, in order to prevent partiality and misconduct. For the purpose of prevent-

---

(*t*) *Jeffreys v. Vanteswarstwarth*, Barn. Ch. R. 141; *Biggs v. Terry*, 1 My. & Cr. 675.

(*u*) 1 Vict., c. 26.

(*v*) *Ex parte Phillips*, 19 Ves. 122; *Sergeson v. Sealey*, 2 Atk. 413; *Ware v. Polhill*, 11 Ves. 278.

(*w*) *Ex parte Grimstone*, 4 Bro. C. C. note, 235; Amb. 708.

(*x*) *Vernon v. Vernon*, cited 1 Ves. Jr. 456.

(*y*) *Ex parte Phillips*, 19 Ves. 122; and compare *Steed v. Preece*, 22 W. R. 432.



ing any such acts of the guardian, from changing im- properly the rights of the parties, who, as heirs or dis- tributees, would otherwise be entitled to the property, it is the constant rule of courts of equity to hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his real estate, to be personalty, and distributable as such; and, on the other hand, to treat real property turned into money (as, for example, timber cut down on an infant's fee simple estate) as still retaining its original character of real estate, *in case of the death of the infant before he arrives of age*. And when the court directs any such change of property, it directs the new investment to be in trust (*but only in case the infant should die under twenty-one*) for the benefit of those who would be entitled to it, if it had remained in its original state (z). On the other hand, *if the infant attains twenty-one*, although he should die the next day, his representatives must take his property according to its actual condition at the time of the death of the once infant.

tives who would have taken before the change, still take after the change, but only if infant dies under age.

In the case of wards of the court, whether male or female, even when they have parents living, or guardians, it is necessary to apply to obtain the permission of the court before their marriage can take place (a). If a man should marry a female ward without the consent and approbation of the court, he and all others concerned in aiding and abetting the Act will be treated as guilty of contempt of court, and may be (but seldom are) punished by imprisonment (b). And it seems that, although the husband, or those contriving and

Marriage of ward of court must be with its permission. Conniving at marriage of ward without consent of court, a contempt.

(z) *Ware v. Polhill*, 11 Ves. 278; *Foster v. Foster*, L. R. 1 Ch. Div. 588.

(a) *Smith v. Smith*, 3 Atk. 305.

(b) *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Ex parte Mitchell*, 2 Atk. 173.

assisting at a marriage, are not aware that the infant is a ward of court, their ignorance will not be sufficient to acquit them of contempt of court, although it may weigh in determining other matters (c).

Guardian must give recognisance that ward shall not marry without consent.

With a view also to prevent the improper marriages of its wards, the guardian on his appointment is generally required to give a recognisance that the infant shall not marry without the leave of the court; so that, if an infant should marry, though without the privity, knowledge, or negligence of the guardian, yet the recognisance would in strictness be forfeited, whatever favour the court might, upon an application, think fit to extend to the guardian when he should appear to have been in no active fault (d).

Improper marriage restrained by injunction.

With the same view, the court will, where there is reason to suspect an intended and improper marriage without its sanction, by an injunction, not only interdict the marriage, but also interdict communications between the ward and the admirer (e), and if the guardian is suspected of any connivance, it will remove the infant from his care and custody, and commit the ward to the care of others (f).

Settlement must be approved by court.

In case of an offer of marriage of a ward, the court will generally refer it to Chambers, to ascertain and report whether the match is a suitable one, and also what settlement ought to be made (g). This reference is usually obtained upon petition.

(c) *More v. More*, 2 Atk. 157; *Herbert's Case*, 3 P. W. 116.

(d) *Eyre v. Countess of Shaftesbury*, 2 L. C. 633.

(e) *Lord Raymond's Case*, Cas. t. Talb. 58; *Pearce v. Crutchfield*, 14 Ves. 206.

(f) *Tombes v. Elers*, Dick, 88.

(g) *Smith v. Smith*, 3 Atk. 305; *Leeds v. Barnardiston*, 4 Sim. 538.

When the marriage has been actually celebrated without the sanction of the court, the court will not discharge the husband, who has been committed for contempt, until he has made such a settlement upon the female ward as, upon a reference to Chambers, shall, under all the circumstances, be equitable and proper. The nature of the settlement will depend in a great measure upon the fortune, position, and conduct of the husband, whether the parties are of equal rank and fortune, or the husband is in such a position as would lead to a suspicion of mercenary motives for the marriage on his part (*h*).

Considerations on a settlement.

Under the Marriage Act, 4 Geo. IV., c. 76, the guardian of any minor, who has married without his consent, may, on information filed, obtain a declaration of forfeiture against either party, who has procured the solemnisation of the marriage by falsely stating that such consent had been given, and the court will thereupon decree a settlement on the innocent party or the issue of the marriage (*i*).

Settlement under Marriage Act, 4 Geo. IV., c. 76.

By 18 & 19 Vict., c. 43 (explained by 23 & 24 Vict., c. 83), an infant, not being under twenty years of age if a male or seventeen years if a female, is enabled, with the approbation of the Court of Chancery, to make a binding settlement on marriage of his or her real and personal estate, whether in possession, reversion, remainder, or expectancy (*j*).

Binding settlements by infants, under 18 & 19 Vict., c. 43.

It will not make any difference in the case, that the ward has since come of age, and is ready to waive her

Waiver by ward of her settlement.

(*h*) *Ball v. Coutts*, 1 V. & B. 303; *Field v. Moore*, 7 De G. M. & G. 691.

(*i*) See 19 & 20 Vict., c. 119, s. 19; *Att.-Gen. v. Read*, L. R. 12 Eq. 38; *Dan. Ch. Pr.* 10-12.

(*j*) *Re Olive*, 11 W. R. 819; *Barrow v. Barrow*, 4 K. & J. 418; *Simson v. Jones*, 2 Russ. & My. 365.

right to a settlement; for the court (if it can find any remaining ground for exercising the jurisdiction over her) will protect her against her own indiscretion, and the undue influence of her husband (*k*).

Father bound to maintain his children, though there is a provision for maintenance. Except when he is prevented by poverty. A wife liable under 33 & 34 Vict., c. 93.

A father is bound to maintain his children, and will not usually have any allowance out of their property for that purpose, notwithstanding there is a provision for their maintenance (*l*); but where the father is in such circumstances of poverty as not to be able to give a child an education *suitable to the fortune which he expects*, maintenance will be allowed (*m*). A wife was formerly under no legal obligation to maintain her children (*n*). But now, by the Married Women's Property Act, 1870 (*o*), if possessed of separate property, she is liable to contribute to their maintenance, to a limited extent, and only in case the husband is unable to maintain them. Also, if there is *a contract* on marriage amounting to a trust, that property SHALL be applied for the maintenance and education of the children, the property must be applied without reference to the ability of the father to maintain and educate them, and in exoneration even of the father (*p*).

When father is entitled to an allowance.

How allowance is regulated.

In allowing maintenance for an infant, regard will be had to the state and condition of his family. Thus, where there are younger children, especially if they are numerous and totally destitute, the court will make a liberal allowance to the eldest son, that he may be the better able to maintain his brothers and sisters (*q*).

(*k*) *Hobson v. Ferraby*, 2 Coll. 412; *Long v. Long*, 2 Sim. & St. 119.

(*l*) *Stocken v. Stocken*, 4 My. & Cr. 98; *Meacher v. Young*, 2 My. & Cr. 490. See also *Ransome v. Burgess*, L. R. 3 Eq. 773.

(*m*) *Buckworth v. Buckworth*, 1 Cox. 81.

(*n*) *Hodgens v. Hodgens*, 4 C. & F. 323.

(*o*) 33 & 34 Vict., c. 93, s. 14.

(*p*) *Thompson v. Griffin*, 1 Cr. & Ph. 317, 320.

(*q*) *Pierpoint v. Cheney*, 1 P. Wms. 488; *Bradshaw v. Bradshaw*, 1 J. & W. 647.

And a liberal allowance will also sometimes be made for infants, in order to relieve or assist their parents when in distressed circumstances (*r*). In all such cases, it is the infant's benefit again which is alone considered; although the benefit which he derives in these cases is indirect and merely of a social and moral kind.

---

(*r*) *Heysham v. Heysham*, 1 Cox. 179; and see *Brown v. Smith*, 10 Ch. Div. 377; *In re Roper's Trusts*, 11 Ch. Div. 272.

## CHAPTER XXIII.

## LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND.

Unsoundness of mind is no ground for jurisdiction in equity.

It is to be stated here at the outset that unsoundness of mind in itself gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom (as we have seen) it makes its wards; but it is not the curator of the person or of the estate of a person *non compos mentis*. And if the Court of Chancery in any case entertains proceedings affecting a person *non compos mentis*, it assumes the jurisdiction upon some ground independent of the unsoundness of mind, that is to say, upon such or the like grounds as it would think sufficient at the suit of the person himself if of sound mind, *e.g.*, upon the ground of a trust, or of a partnership, or such like (*a*).

The jurisdiction was in the Exchequer, upon inquisition.

Clearly, therefore, it would be an error to suppose that the Court of Chancery, as such, has jurisdiction in lunacy; nor is any encouragement given to that error in the history of the jurisdiction of the court, as stated in Part i., Chapter i., of this Hand-book. It was there stated that the Court of Chancery, as a permanent tribunal, originated in 22 Edward III. by an ordinance of that king and in that year; but already long before that date the jurisdiction in lunacy was already in existence, and was at that time vested in the Court of Exchequer (*b*), that court having special care of the

---

(*a*) *Beall v. Smith*, L. R. 9 Ch. App. 85; *In re Edwards*, *M'Neile v. Chambers*, 10 Ch. Div. 605; *In re Currie*, 10 Ch. Div. 93. But see *Vane v. Vane*, L. R. 2 Ch. Div. 124, commented on in *Re Bligh*, W. N. 1879, p. 150.

(*b*) Mem. Scacc. Trin. 19 Edw. I.

Crown's prerogative in the matter of revenue, of which lunacy and idiocy were sources. This prerogative of the Crown was subsequently defined in the Statute of Prerogatives (*c*), the 9th chapter of that statute relating to idiots, and the 10th chapter relating to lunatics. Under these two chapters of that statute, the Crown acquired (in effect) the management of the estates of idiots and of lunatics, subject to the duty of maintaining the idiot or lunatic, as the case might be, during all the period of the mental incapacity, and rendering up the same estates to the representatives of the idiot upon his death and to the lunatic himself (upon his recovery), or to his representatives in like manner upon his death. There was practically little distinction in the Crown's management of the estates, whether of idiots or of lunatics, and the distinction (so far as any existed) has long since ceased. And at the present day whatever is stated of lunacy is commonly intended (as in the residue of this present chapter) of both lunatics and idiots indifferently, including also all persons whatsoever of unsound mind so found by inquisition.

The jurisdiction of the Court of Exchequer in lunacy was very early superseded; and the jurisdiction was subsequently vested in divers courts and in divers officials, not profitable to specify here; but eventually the practice became a constant one of the Crown to delegate the care and custody of lunatics and of their estates to the Lord Chancellor, not as being the President of the Court of Chancery, but as being an executive officer of the highest standing in the realm and enjoying the most intimate personal relations with the Crown. The accident that he was also a great judicial officer, head of the Court of Chancery, and competent as an adviser in matters of law and equity affecting or which might possibly affect the lunatic as regarded his

Because a  
matter of  
revenue.

Exchequer  
jurisdiction in  
lunacy trans-  
ferred to Lord  
Chancellor.

property and even his person, was a reason not without its own weight, which probably helped to permanently fix the jurisdiction in lunacy in the President of the Chancery Court. The convenience of the conjunction is in many ways felt at the present day, as will appear hereunder.

Lords Justices in Chancery, concurrently with, and in aid of, Lord Chancellor, acquired the jurisdiction, and now exercise it.

Shortly after the appointment of the Lords Justices in 1851 (*d*), as a court of Appeal in Chancery with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery (§ 5), a warrant was made out to each of them under the Queen's Sign Manual, entrusting them with the care and custody of lunatics; and under the Lunacy Regulation Act, 1853 (*e*) the jurisdiction of the Lords Justices in lunacy was continued, concurrently with that of the Lord Chancellor; and upon the coming into operation of the Judicature Acts, 1873-5, when the Lords Justices became a mere limb of the new Court of Appeal, and were therefore indirectly deprived of all original jurisdiction in the Chancery division of the High Court, they were appointed, by virtue, apparently, of sect. 51 of the Judicature Act, 1873, additional judges of the High Court of Justice, for the purpose of more effectively exercising their jurisdiction in lunacy (*f*), so as to possess and be able to exercise all that original jurisdiction of Chancery that was ancillary to the jurisdiction in lunacy. But the aforesaid combination of a limited Chancery jurisdiction with the lunacy jurisdiction proper has not altered the character, nor reduced the extent, of the lunacy jurisdiction, from which therefore, as heretofore, the appeal lies not to the House of Lords (as it would from Chancery proper) but to the Judicial Committee of H. M. Privy Council (*g*).

(*d*) 14 & 15 Vict., c. 83.

(*e*) 16 & 17 Vict., c. 70.

(*f*) *Re Lamotte*, L. R. 4 Ch. Div. 325.

(*g*) *Grosvenor v. Drax*, 2 Knapp. 82; Judicature Act, 1873, s. 18, suspended by Judicature Act, 1875, s. 2, till Nov. 1, 1876, and now apparently suspended altogether.



The recent case *Beall v. Smith* (h) affords a striking illustration of the several jurisdictions in Chancery and in Lunacy. There, the plaintiff having become of unsound mind, a bill was filed in his name by a next friend for the purpose of winding up the business in which he had been engaged; a receiver was appointed, and a decree directing accounts was taken. The plaintiff's family were not consulted in the institution of the suit, and were opposed to its further prosecution. Nevertheless, an order on further consideration was made, and the costs of the suit taxed and paid out of the estate. Pending the suit, application was made in Lunacy, and an inquisition having been issued, and verdict finding the lunacy obtained, a committee was appointed of the plaintiff's estate. It having then been discovered that further proceedings had been taken in the suit, a petition was presented by the lunatic and his committee for a declaration that the same were void; and on appeal to the Lords Justices, it was ordered that all proceedings in the suit, subsequent to the appointment of the receiver, should be set aside, with costs to be paid by the plaintiff's solicitor; the court expressing an opinion, that all the proceedings after the inquisition were a gross contempt on the jurisdiction in Lunacy.

*Beall v. Smith*,  
—what proceedings in Chancery would be a contempt on the Lunacy jurisdiction.

The Lord Justice James thus stated the principles which regulate the court in the exercise of its jurisdiction in cases of persons of unsound mind not so found by inquisition: "It is to be borne in mind, that unsoundness of mind gives the Court of Chancery no jurisdiction whatever. The Court of Chancery is not the curator either of the person or the estate of a person of unsound mind, whom it does not and cannot make its ward. It is *not by reason of the incompetency, but notwithstanding the incompetency*, that the Court of

Equity exercises its jurisdiction in spite of the unsoundness of mind, and only where no inquisition.

Chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property, than it can the management or disposition of the property of a person abroad or confined to his bed by illness. The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind" (*i*).

Or, if an inquisition, then only by direction of the Court in Lunacy.

And further, in his judgment in the last-mentioned case, the same Lord Justice further stated, that the committee appointed over the person and estate of a lunatic is only an officer of the Court of Lunacy, that court being only the delegate of the Crown's prerogative; and that it was, because in that way the Crown, by its proper tribunal, had the lunatic and all his affairs under its exclusive care and protection, that the power of any other person to commence or to prosecute any proceedings for his protection was taken away. Application can at all times be made to the Court in Lunacy by the lunatic's committee for the court's sanction as to anything that may require to be done, and that court may direct proceedings in the High Court. And for the better guidance of the committee, the Lunacy Regulation Act, 1853, beforementioned, in its 108th and following sections, contains various directions and authorities to the committee regarding the management and administration of the lunatic's estate, and making reports thereof to the Court of Lunacy or its proper officers, the masters (*j*).

Conversion of lunatic's estate.

His interest alone consulted.

In the case of a lunatic, the court will not generally alter the state of the lunatic's property so as to affect the rights of his representatives, unless where it is for the benefit of the lunatic himself. "The general object of attention in the administration is solely and

(*i*) See also *Jones v. Lloyd*, 22 W. R. 787; *Vane v. Vane*, L. R. 2. Ch. 124.

(*j*) *In re Meares*, 10 Ch. Div. 552.

entirely *the interest of the lunatic himself*, without looking to the interests of those who upon his death may have an eventual right of succession. Accordingly in such a case, where the conversion is made by the direction of a court of competent jurisdiction in Lunacy, as there are no equities between the heir and the next of kin, they will take the properties to which they are respectively entitled, according to the actual character in which they find them" (*k*).

His representatives have no equities between them. They take the fund in the character in which it is actually found.

---

(*k*) *Oxenden v. Compton*, 2 Ves. Jr. 72; *Ex parte Phillips*, 19 Ves. 118; *Re Leeming*, 7 Jur. N. S., 115; 3 De G. F. & Jo. 43; *In re Wharton*, 5 De G. M. & G. 33, 16 & 17 Vict., c. 70, s. 119. And compare decision in *Steed v. Preece*, 22 W. R. 432.

## PART III.

*THE CONCURRENT JURISDICTION.*

Origin of concurrent jurisdiction.

THE concurrent jurisdiction of courts of equity had its origin in this way,—Either the courts of law, although they had a general jurisdiction in the matter, could not give adequate, specific, or perfect relief, or, under the actual circumstances of the case, they could not give relief at all. It often happened, *e.g.*, that a simple judgment for the plaintiff or for the defendant did not meet the full merits and exigencies of the case, but a variety of adjustments, limitations, and cross claims had to be introduced and worked out, and a decree meeting all the circumstances of the particular case between the very parties was therefore indispensable to complete distributive justice. And it also often happened that the object sought, though treated as generally falling within a class of right cognisable by courts of law, was in the special instance, from special circumstances, or from the weakness of the common law, practically beyond the pale of its jurisdiction; as, for instance, where a perpetual injunction, or a preventive process to restrain trespasses, nuisances, waste, was wanted. It might, therefore, be said that the concurrent jurisdiction of equity extended to all cases of legal rights, where, under the circumstances, there was not an adequate and complete remedy at law. And while at the present day, in consequence of the fusion of law and equity, under the Judicature Acts, 1873-5,

Concurrent jurisdiction extends to cases where there is not a plain, adequate, and complete remedy at law.

the jurisdictions at law and in equity are throughout concurrent, still in all these cases in which the equity jurisdiction, though concurrent, would prior to that fusion have been the preferable jurisdiction to sue under, in all these cases the Chancery Division is and remains the appropriate jurisdiction in which to entitle and to prosecute the action, and it is so for the identical reasons that were heretofore of weight, making only verbal changes therein.

The subject of the concurrent jurisdiction may be Division of the subject. divided into two branches :—

I. Cases in which the ground of action itself constitutes the principal foundation for the jurisdiction, *e.g.*, cases of accident, mistake, or fraud ; and,

II. Cases in which the peculiar remedies afforded by courts of equity constitute the principal ground of the jurisdiction, *e.g.*, matters of suretyship, partnership, questions of account and set-off, specific performance, injunction, partition, &c.

These two several branches of the jurisdiction will be taken in the order above expressed. And under the first of them fall,—

1. Accident ;
2. Mistake ; and
3. Fraud, Actual and Constructive, together with  
Fraud in relation to Companies.

## CHAPTER I.

## ACCIDENT.

**Accident.** By the term accident is intended in equity, not any inevitable casualty or act of Providence, or *vis major*, *i.e.*, irresistible force, but any unforeseen event, misfortune, loss, act, or omission which is not the result of negligence or misconduct in the party. For example, if an annuity is directed by a will to be secured by public stock, and an investment is accordingly made, sufficient at the time for the purpose, but afterwards the stock is reduced by Act of Parliament, so that it becomes insufficient, equity will relieve the executor from all liability therefor as an accident, although it may decree the deficiency to be made up against the residuary legatees (*a*).

**Reduction of Government stock.**

**To give equity jurisdiction, there must be no complete legal remedy, and the party must have a conscientious title to relief.** But it is not every case of accident which will justify the interposition of a court of equity (*b*). The jurisdiction being concurrent, will be maintained only, *first*, when a court of law cannot grant suitable relief; and *secondly*, when the party has a conscientious title to relief. Both circumstances must concur in any case to constitute a ground on which relief in equity may be craved. For it is certain that in some cases of accidents, courts of law can and always could afford adequate relief, as in cases of "loss of deeds, mistakes in receipts and payments, wrong payments,

---

(*a*) *Davies v. Wattier*, 1 Sim. & St. 463; *May v. Bennett*, 1 Russ. 370; St. 93.

(*b*) *Whitfield v. Furuset*, 1 Ves. Sr. 392.

deaths which make it impossible to perform a condition literally, and a multitude of other contingencies (c).

The first consideration, then, is whether there is an adequate remedy at law? not merely whether there is some remedy at law; and here a most material distinction is to be attended to. In modern times, courts of law frequently interfere and grant a remedy, under circumstances in which it would certainly have been denied by these same courts in earlier periods; and sometimes the Legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. With reference to either of these cases, it is a fixed rule, that, if the courts of equity originally obtained and exercised jurisdiction over a particular subject-matter, that jurisdiction cannot be in any way affected, merely by the circumstance, that the common law courts have had conferred upon them a power to deal with such subject-matter, similar to that exercised by courts of equity. "It does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it always had" (d).

Is there an adequate remedy at law?

Courts of equity do not lose their jurisdiction because the common law courts have subsequently acquired it also.

I. The cases in which equity will give relief against accident fall conveniently into three groups, viz. the following:—

I. Cases in which equity relieves against accident.

- (1.) Cases of lost and destroyed documents;
- (2.) Cases of the imperfect execution of powers; and,
- (3.) Cases of erroneous payments.

In the first of these three groups of cases, one of the most common interpositions of equity is in the case of bonds or other instruments under seal which have been

First group of cases,—lost and destroyed documents.

(c) 3 Bl. Com. 431.

(d) *Atkinson v. Leonard*, 3 Bro. C. C. 222; *British Empire Shipping Co. v. Somerset*, 3 K. & J. 437.

(1.) Bonds, &c., *lost*. Until a very recent period, the doctrine prevailed that there could be no remedy on a *lost* bond in a court of common law, because there could be no *profert* or production of the instrument in court, in order that the defendant might demand *oyer* of it—that is, that it should be produced and read in open court (e). At present, however, the courts of law do entertain the jurisdiction, and dispense with the *profert*, if an allegation of loss, by time and accident, is stated in the declaration (f). But this circumstance is not permitted in the slightest degree to change the course in equity (g).

Equity can grant relief by requiring an indemnity, which a court of law cannot do.

The original ground, therefore, of granting the relief was the supposed inability of a court of law to afford it in a suitable manner, from the impossibility of making a *profert*; but, independently of that ground for the original interference of equity, there was another satisfactory reason for the continuance of that interference, notwithstanding that courts of common law had jurisdiction over the subject-matter. A court of equity alone could give a complete remedy, with all the fit limitations which justice required, by granting relief only upon the condition that the plaintiff who sought its aid should give, if necessary, a suitable bond of indemnity. Now a court of law was incompetent to require such a bond of indemnity as a part of its judgment, although it has sometimes attempted an analogous relief by requiring the previous offer of such an indemnity. But such an offer might in many cases fall far short of the just relief; for in the intermediate time there might be a great change in the circumstances of the parties to the bond of indemnity (h).

---

(e) The old practice of *profert* and *oyer* is abolished by the C. L. P. Act of 1852, s. 55. And see *Walmsley v. Child*, 1 Ves. Sr. 344.

(f) *Read v. Brookman*, 3 T. R. ; 151 *Duffield v. Elwes*, 1 Bligh, N. S. 543.

(g) *Kemp v. Pryor*, 7 Ves. 249, 250.

(h) See *England v. Tredegar*, L. R. 1 Eq. 622.



Thus, in *The East India Co. v. Boddam* (i), Lord Eldon says, "How can a court of law contrive an indemnity? In a case before me in the Court of Common Pleas, the declaration was upon a lost bill of exchange. The plaintiff in the action proves that he offered to indemnify. Suppose he proves that he proposed the security of a man, in the highest credit at that time, but who became a bankrupt an hour afterwards. Is that an indemnity?" (k). }

There used to be an important distinction of procedure between cases where a plaintiff, alleging the loss of a bond, sought discovery merely, and cases where he prayed for relief. Where discovery only, and not relief, was the object of the bill, there equity would grant the discovery without any affidavit of loss or offer of indemnity; but equity would entertain a suit for relief, only upon the party making an affidavit of loss of the instrument, and offering indemnity.

Where discovery is sought, no affidavit necessary, unless relief also is asked.

The ground of this distinction was that, when relief was prayed, the forum of jurisdiction was sought to be changed from law to equity; and in all such cases an affidavit ought to be required, to prevent abuse of the process of the court. But when discovery only was sought, the original jurisdiction remained at law, and equity was merely auxiliary. The jurisdiction for discovery alone would therefore seem, upon principle, to have been universal. But the jurisdiction for relief was special and limited to peculiar cases; and in all these cases there must have been an affidavit of the loss, and when proper, an offer of indemnity also, in the bill (k).

At the present day, there cannot be (or can hardly

---

(i) 9 Ves. 467.

(j) *Ex parte Greenaway*, 6 Ves. 812.

(k) *Walmsley v. Child*, 1 Ves. Sr. 334.

be) any case of an action in equity regarding a *lost* bond for discovery only; and therefore the action being for relief, the affidavit of loss and the offer of indemnity will in all cases now be required.

(2.) Title-deeds  
being *lost*.

But the loss of a title-deed was not always a ground to come into a court of equity for relief; for if there was no more in the case, although the party might be entitled to a discovery of the original existence and validity of the deed, courts of law might afford just relief, since they would admit evidence of the loss of a deed, just as a court of equity would do (*l*), and upon proof of such loss secondary evidence of the contents of the deed and (if necessary) of its validity also, was admissible at law. To enable the party, therefore, in case of a lost title-deed, to come into equity for relief, he must have established that there was no remedy at all at law, or no remedy which was adequate and adapted to the circumstances of the case. Thus, he might come into equity when a title-deed of land had been destroyed, or else concealed by the defendant; for then, as the party could not know which alternative was correct, a court of equity would make a decree, which a court of law could not, that the plaintiff should hold and enjoy the land until the defendant should produce the deed or admit its destruction (*m*). So, if a deed concerning land was lost, and the party in possession prayed discovery, and to be established in his possession under it, equity would relieve, for no remedy in such a case lay at law (*n*). And where the plaintiff was out of possession, there were cases in which equity would interfere upon lost or suppressed title-deeds, and would decree possession to the plaintiff; but in all such cases, there must have been other equities calling for the action of the

---

(*l*) *Whitfield v. Faussct*, 1 Ves. Sr. 392.

(*n*) *Dalston v. Coatsworth*, 1 P. Wms. 731.

(*m*) *Ibid*.

court (o). Indeed, the bill must always have laid some ground besides the mere loss of a title-deed, or other sealed instrument, to justify a prayer for relief—as that the loss obstructed the right of the plaintiff at law, or left him exposed to undue perils in the future assertion of such right. And the like special grounds would still be necessary in such cases, and for obvious reasons, to found the equity jurisdiction.

With reference to lost bills of exchange and other negotiable instruments, it was, after some conflict of authority, decided, that if a bill, note, or cheque, negotiable either by endorsement and delivery, or by delivery only, was lost, no action would lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration (p); and the law was the same though the bill had never been endorsed (q.) In this case, therefore, the proper remedy was in equity, not only on the ground of there being no remedy at law, but also on account of the power equity possessed of compelling the plaintiff to give a proper indemnity to the defendant. And the jurisdiction of equity over such cases of lost bills was not taken away by the 17 & 18 Vict., c. 125, s. 87, which enacts, that in case of any action founded upon a bill of exchange or other negotiable instrument, the court of common law has power to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court against the claims of any other person upon such negotiable instrument (r).

It seems to be doubtful whether or not, if a bill or note *not negotiable* be lost, an action will lie at law on

(3.) Negotiable instruments being lost.

(4.) Non-negotiable instruments being lost.

(o) *Dormer v. Fortescue*, 3 Atk. 132.

(p) *Hansard v. Robinson*, 7 B. & C. 90; *Crowe v. Clay*, 9 Exch. 604.

(q) *Ramuz v. Crowe*, 1 Exch. 167.

(r) *King v. Timmerman*, L. R. 6 C. P. 466.

the bill, or (failing that) on the consideration (s); in equity, however, such a security may be assigned, and therefore an indemnity would be justly demandable, and this gives to equity sufficient ground for assuming the jurisdiction.

(5.) Negotiable and non-negotiable instruments being destroyed.

As to DESTROYED *negotiable* instruments, the weight of authority seems to support the conclusion that at common law, by the customs of merchants, the holder suing on the bill or note must, on payment, deliver up the bill or note, and cannot recover unless he do so, and he cannot do so when the instrument has been destroyed; but that he may in such a case recover on the original consideration, and that is enough (t). Also, in the case of *Wright v. Maidstone* (u), Wood, V.-C., held that courts of equity have never acquired jurisdiction to give relief on account of the *destruction* of a bill of exchange, because there was a complete remedy in such cases at law. With regard to DESTROYED *non-negotiable* instruments, the rule is the same as for negotiable instruments when destroyed (v).

Second group of cases,—  
(1.) Defective execution of powers, being powers simply.

It is a general rule that the *non-execution* of a mere power will not be aided in equity (w). But the rule is different where there is a defective execution of a power, resulting either from accident, mistake, or both, and also in regard to agreements to execute powers which may generally be deemed a species of defective execution (x). Equity will relieve in such cases against the defective execution of a power, but only in favour of certain persons who are regarded by a court of equity

(s) Byles on Bills, 374.

(t) *Hansard v. Robinson*, 7 B. & C. 95; Byles on Bills, 373.

(u) 1 K. & J. 708.

(v) Byles on Bills, 372.

(w) *Arundell v. Phillpot*, 2 Vern. 69; *Bull v. Vardy*, 1 Ves. Jr. 272.

(x) Sugd. on Pow. 549.

with peculiar favour, and where there are no opposing equities in the case. The aid of equity will be afforded (1) to a purchaser (*y*), which term includes a mortgagee and a lessee (*z*); (2) to a creditor (*a*); (3) to a wife (*b*); (4) to a legitimate child (*c*), for wives and children are in some degree considered as creditors by nature (*d*); and (5) to a charity (*e*). But it has been decided that a defective execution will not be aided in favour of the donee of the power (*f*), nor of a husband (*g*), nor of a natural child (*h*), nor of a grand-child (*i*), nor of remote relations, much less of volunteers (*j*); and, in fact, in favour of no others than the five favoured classes of persons above enumerated.

As to the defects which will be aided, they may generally be said to be any which are not of the very essence and substance of the power. Thus, a defect by executing the power by will when it is required to be by deed or other instrument *inter vivos* will be aided (*k*); but not *vice versâ*, for if the power is required to be executed only by will, and it is executed by an absolute and irrevocable deed, no relief will be granted (*l*). Nor will equity aid where the power is executed without the consent of parties who are re-

What defects in the execution of a power are aided.

- 
- (*y*) *Fothergill v. Fothergill*, 2 Freem. 257.  
 (*z*) *Barker v. Hill*, 2 Ch. R. 218; *Reid v. Shergold*, 10 Ves. 370.  
 (*a*) *Pollard v. Greenvil*, 1 Ch. Ca. 10; *Wilkes v. Holmes*, 9 Mod. 485.  
 (*b*) Cowp. 267; *Clifford v. Burlington*, 2 Vern. 379.  
 (*c*) *Sarh v. Blanford*, Gilb. Eq. R. 166; *Sneed v. Sneed*, Amb. 64;  
*Bruce v. Bruce*, L. R. 11 Eq. 371.  
 (*d*) *Barnard*, C. C. 107; *Hervey v. Hervey*, 1 Atk. 561.  
 (*e*) *Innes v. Sayer*, 7 Hare, 377; 3 Mac. & G. 609; *Att.-Gen. v. Sibthorp*, 2 Russ. & My. 107.  
 (*f*) *Ellison v. Ellison*, 6 Ves. 656.  
 (*g*) *Watt v. Watt*, 3 Ves. 244.  
 (*h*) *Tudor v. Anson*, 2 Ves. Sr. 582.  
 (*i*) *Watts v. Bullas*, 1 P. Wms. 60.  
 (*j*) *Smith v. Ashton*, 1 Freem. 309.  
 (*k*) *Tollet v. Tollet*, 1 L. C. 254.  
 (*l*) *Reid v. Shergold*, 10 Ves. 370; *Adney v. Field*, Amb. 654

quired to consent to it (*m*), unless when their consent has become immaterial or impossible to obtain. But equity will supply such defects as the want of a seal, or of witnesses, or of a signature, or defects in the limitations of the property (*n*).

(2.) Execution of powers in the nature of trusts, although left wholly unexecuted.

But we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. Powers are never imperative, they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted (*o*). But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; in other words, the trust may have been vested in him under the garb or in the disguise of a power, but it is none the less for that a trust; and if he refuse to execute it, or die without having executed it, equity will interpose and give suitable relief, because his omission to do so by accident or design, ought not to disappoint the objects of the donor (*p*).

Third group of cases.  
(1.) Accident in payment by executors or administrators.

In the course of administration of estates, executors and administrators often pay debts and legacies under a well-founded belief that the assets are sufficient for all purposes. It may turn out, however, from unexpected occurrences, or from unsuspected debts and claims coming to light subsequently, that there is a deficiency of assets—for the payment even of the debts.

(*m*) *Mansell v. Mansell*, cited in *Scott v. Tyler*, 2 Bro. C. C. 450.

(*n*) *Chance on Powers*, 2878, 2879, 2886, 2890. See 1 Vict., c. 26, s. 10, and 22 & 23 Vict., c. 35, s. 12.

(*o*) Wilm. 23.

(*p*) *Warneford v. Thompson*, 3 Ves. 513; *Brown v. Higgs*, 8 Ves. 574.

Under such circumstances the executors used to be entitled to no relief at law. But in a court of equity, if they have acted with good faith and with due caution, they will be clearly entitled to relief, upon the ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident (*q*). An executor or administrator stands in the condition in equity of a gratuitous bailee, and will not be charged without some default in him. Therefore, if any of the goods of the testator are stolen from the executor, or from the possession of a third person to whose custody they have been delivered by the executor, the latter shall not in equity be charged with these assets (*r*). Again, if the goods be of a perishable nature, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself (*s*). And since the Judicature Acts, 1873-5, this is now the view accepted in courts of law regarding the executor's position (*t*).

As another illustration of the doctrine of relief in equity upon the ground of accident, it may be stated, that if a minor is bound as apprentice to a person, and a large premium is given to the master, who becomes bankrupt during the apprenticeship, in such a case equity will interfere, and apportion the premium upon the ground of the failure of the contract from accident (*u*),—a principle of equity, which has been adopted by the Legislature in the Bankruptcy Act, 1869 (*v*).

(2.) A minor bound as apprentice, and master becomes bankrupt.

(*q*) *Edwards v. Freeman*, 2 P. Wms. 447; *Hawkins v. Day*, Amb. 160; St. 90.

(*r*) *Jones v. Lewis*, 2 Ves. Sr. 240.

(*s*) *Clough v. Bond*, 3 My. & Cr. 496; Wms. on Exors. 1666-1679.

(*t*) *Job v. Job*, 26 W. R. 206; L. R. 6 Ch. Div. 562.

(*u*) *Hale v. Webb*, 2 Bro. C. C. 78.

(*v*) 32 & 33 Vict., c. 71, s. 33.

II. Cases where equity will not give relief.  
(1.) In matters of positive contract,—*e.g.*, Absolute covenant to pay rent, not relieved against, upon destruction of demised premises.

II. It remains to consider, secondly, those cases of accident in which equity will not give relief. In the first place, in matters of positive contract and obligation created by the deliberate act of the parties, it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident; or that he has been in no default; or that he has been prevented by accident from deriving the full benefit of the contract on his own side. Thus, if a lessee on a demise covenants to pay rent, or to keep the demised premises in repair, he will be bound to do so in equity as well as in law, notwithstanding the destruction or injury of those premises by inevitable accident, as if they are burnt by lightning, or destroyed by public enemies, or by any other accident, or by overwhelming force (*w*). The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume an intentional general liability where he has made no exception (*x*).

(2.) Contracts where parties are equally innocent.

And the like doctrine applies to other cases of contract where the parties are equally innocent. Thus, for instance, if there is a contract for a sale at a price to be fixed by an award, during the life of the parties, and one of them dies before the award is made, the contract fails, and equity will not enforce it upon the ground of accident; for the time of making the award is expressly fixed in the contract, according to the pleasure of the parties; and there is no equity to substitute a different period (*y*).

(3.) Where party claiming

In the next place, courts of equity will not grant

---

(*w*) *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock Can. Co. v. Pritchard*, 6 T. R. 750; *Belfour v. Weston*, 1 T. R. 310; *Pym v. Blackburn*, 3 Ves. 34, 38.

(*x*) St. 101. See also *Bute (Marquis) v. Thompson*, 13 M. & W. 487; *Mellers v. Devonshire (Duke)*, 16 Beav. 252.

(*y*) St. 103; *Blundell v. Brettargh*, 17 Ves. 232-240; *White v. Nutts*, 1 P. Wms. 61; *Mortimer v. Capper*, 1 Bro. C. C. 156.



relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault ; for, in such a case, there is in fact no accident properly so called, as above defined, and a party has no claim to come into a court of justice, to ask to be saved from the consequences of his own culpable misconduct (z). relief has been  
guilty of gross  
negligence.

Again, courts of equity will not interpose upon the ground of accident, where a party has not a clear vested right ; but his claim rests in mere expectancy, and is a matter not of trust, but of volition. As if a testator, intending to make a will in favour of particular persons, is prevented from doing so by accident, equity cannot grant relief ; for a legatee or devisee is a mere volunteer taking by the bounty of the testator, and has no independent right, until there is a title consummated by law (a). (4.) Where  
party claiming  
relief has no  
vested right,  
but only a  
probability of  
a right.

In the next place, no relief will be granted in equity where the other party stands upon an equal equity, and is entitled to equal protection, as in the case of a *bonâ fide* purchaser for valuable consideration without notice (b). (5.) Equity will  
not aid one  
party where  
the other  
party has an  
equal equity.

---

(z) *Ex parte Greenaway*, 6 Ves. 812.

(a) *Whitton v. Russel*, 1 Atk. 448.

(b) *Powell v. Powell*, Prec. Ch. 278 ; *Malden v. Menill*, 2 Atk. 8.

## CHAPTER II.

## MISTAKE.

Mistake.

MISTAKE, as recognised and relievable against in a court of equity, may be defined, in contradistinction from accident, as some unintentional act or omission arising from ignorance or surprise, and sometimes from imposition or misplaced confidence, but in the latter case it is not distinguishable from fraud.

This subject may be divided into two classes of cases—

I. Mistakes in matter of *law*.

II. Mistakes in matter of *fact*.

I. Mistake of law,—as a general rule, not relievable.

*Ignorantia legis neminem excusat.*

I. As to mistakes in matter of law, it is a well-known maxim that ignorance of the law is no excuse to any person either for a breach or for an omission of duty,—*Ignorantia legis neminem excusat*—and this maxim is as much observed in equity as at law. The presumption is, that every one assuming to deal with his own property is acquainted with his rights to it or in it, provided he has had a reasonable opportunity of knowing them. And nothing can be more liable to abuse than to permit a person after parting with his property to reclaim it upon the mere pretence that, at the time of parting with it, he was ignorant of the law affecting his title. But the maxim applies, properly speaking, only to the general law of the country (*a*), and not therefore to ignorance of a private *jus* or right.

---

(a) *Cooper v. Phipps*, L. R. 2 H. L. 149, 170.

An agreement entered into in good faith, though under a mistake of law, will be held valid and obligatory upon the parties. Thus, where a devise was made to a woman upon condition that she should marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other persons, and these latter persons afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the court refused any relief. Lord Hardwicke said, "It is said they might know the fact (*i.e.*, of the marriage without consent) and yet not know the consequence in law; but if parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point, and shall not be relieved on pretence of being surprised, with such strong circumstances attending it" (b).

An agreement under a mistake of law binding.

Although it is clear that relief will not be granted in equity against a mistake in point of law, with full knowledge of all the facts, there are certain cases apparently exceptions to this general rule, and usually so classed, but which, upon examination, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation, imposition, abuse of confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief (c).

Cases in which equity relieves against a mistake of law.

Thus, it has been laid down as an unquestionable doctrine, that if a party, acting in ignorance of a clear

(1.) Where a party acts under ignorance

(b) *Pullen v. Ready*, 2 Atk. 591; *Irnham v. Child*, 1 Bro. C. C. 92; *Worrall v. Jacob*, 3 Mer. 255.

(c) *Willan v. Willan*, 16 Ves. 82.

of a plain and well-known principle of law.

and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake. Thus, if the eldest son, who is heir-at-law of all the undisposed-of fee-simple estates of his ancestor, should, in gross ignorance of that rule of law, knowing, however, that he was the eldest son, agree to divide the estates with the younger brother, such an agreement would be held in a court of equity invalid, and relief would be granted. Here, ignorance of a plain and established doctrine so generally known, and of such constant occurrence, as a common canon of descent, may well give rise to a *presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused*. But in such cases the mistake of law is not the foundation of the relief, but it is the medium of proof to establish some other proper ground of relief. And perhaps, in this case, the eldest son's ignorance of his being the heir-at-law may be considered a mistake of a fact as well as of law, and on that ground alone might entitle him to relief (*d*).

(2.) Surprise combined with a mistake of law remedied.

Cases of surprise, combined with a mistake of law, also stand upon a ground peculiar to themselves. In such cases the agreements or acts are unadvised and improvident, and without due deliberation; and therefore they are held invalid upon the common principle adopted by courts of equity, to protect those who are unable to protect themselves, and of whom an undue advantage is taken (*e*). Where the surprise is mutual there is of course a still stronger ground to interfere, for neither party has intended what has been done.

---

(*d*) *Broughton v. Hutt*, 3 De G. & Jo. 501; and see remarks of Lord Westbury in *Cooper v. Phipps*, L. R. 2 H. L. 170.

(*e*) *Evans v. Llewellyn*, 2 Bro. C. C. 150; *Ormond v. Hutchinson*, 13 Ves. 51.

They have misunderstood the effect of their own agreements or acts; or have pre-supposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist (*f*).

But where the mistake arises not from ignorance of a plain and settled principle of law, but on a doubtful point of law, a compromise fairly entered into, with due deliberation and full knowledge, will be upheld in a court of equity as reasonable in itself, to terminate the differences by dividing the stake, and as supported by principles of public policy (*g*).

It is upon this ground that the whole doctrine of the validity of family compromises rests. The principle has been fully established that, when family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, each of the parties investigating the subject for himself, and each communicating to the other all he knows, and all the information which he has received on the question, then, although the parties may have greatly misunderstood their position, and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement (*h*). “Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour, of the family, those arrangements have been sustained by this court, albeit, perhaps, resting

Compromises,  
—upheld  
where a doubtful point of  
law.

Family compromises,—  
upheld if no  
suppression  
veri, or  
suggestio falsi,  
but a full disclosure.

(*f*) *Willan v. Willan*, 16 Ves. 72, 81; *Cochrane v. Willis*, L. R. 1 Ch. 58.

(*g*) *Pickering v. Pickering*, 2 Beav. 56; *Gibbons v. Caunt*, 4 Ves. 849; *Naylor v. Winch*, 1 S. & S. 564.

(*h*) *Gordon v. Gordon*, 3 Swanst. 463.

upon grounds which would not have been considered as satisfactory if the transaction had occurred between strangers" (i). And these principles will apply whether the doubtful points, with reference to which the compromise has been made, are matters of fact or of law (j). But in order that a transaction, not otherwise valid, may be supported upon the ground of its being a family arrangement, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement, which are within the knowledge of the several parties, whether such information be asked for by the other party or not (k). "*There must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient*" (l). And especially if parties are not on equal terms, and one of them stands in such a relation to the other as renders it incumbent on him to give a full account of the matter in dispute, to the utmost of his knowledge, and he omits to do so, the court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties (m).

Equity will not aid where position of parties has been altered.

And the disinclination of equity to set aside a family or other compromise entered into *bonâ fide*, and with a full disclosure of all facts known to either party, will be strengthened, where subsequent arrangements have taken place on the footing of such a compromise (n). But where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual

---

(i) *Westby v. Westby*, 2 Dr. & War. 503.

(j) *Neale v. Neale*, 1 Kee. 672; *Westby v. Westby*, 2 Dr. & War. 503.

(k) *Greenwood v. Greenwood*, 2 De G. Jo. & Sm. 28.

(l) *Gordon v. Gordon*, 3 Swanst. 400; *De Cordova v. De Cordova*, 4 App. Ca. 692.

(m) *Pusey v. Desbouverie*, 3 P. Wms. 315; *Sturge v. Sturge*, 12 Beav. 229.

(n) *Clifton v. Cockburn*, 3 My. & K. 76; *Bentley v. Mackay*, 31 Beav. 143, 10 W. R. 873.

intoxication, and want of professional advice, courts of equity have manifested a strong disinclination to support a compromise, whether between members of a family or between strangers (*o*). *Secus*,—where gross ignorance or imposition.

It has been already stated that where a *bonâ fide* purchaser for valuable consideration, without notice, is concerned, equity will not interfere to grant relief in favour of a party, although he has acted in ignorance of his title upon a mistake of law; for in such a case the purchaser has at least an equal right to protection with the party who has committed the mistake; and where the equities are equal, the court will not interfere between the parties (*p*). Equity will not aid against a *bonâ fide* purchaser for value without notice.

II. As to mistakes of fact, the general rule is that an act done, or contract made, under a mistake or in ignorance of a material fact, is voidable and relievable in equity; for it is not possible that any one can, by any amount of diligence, acquire a knowledge of all matters of fact. With reference to this subject, the following general propositions may be laid down:— (II.) Mistake of fact,—as a general rule relievable.

1. The rule as to ignorance or mistake of a fact entitling the party to relief, is to be taken with this important qualification,—that the fact must be material to the act or contract; that is, that it must be essential to its character. For though there may be an accidental ignorance or mistake of a fact, yet, if the act or contract is not materially affected by it, the party claiming relief on that immaterial ground will be denied it. And the same principle is applicable though the mistake be mutual, as if a person should sell a message to another which was at the time (a.) Principles on which relievable.  
1. Fact must be material.

---

(*o*) *Dunnage v. White*, 1 Swanst. 137; *Persse v. Persse*, 7 C. & Fin. 318.

(*p*) *Malden v. Mcmill*, 2 Atk. 8.

swept away by a flood, without either party having any knowledge of the fact, equity would relieve the purchaser upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract (*g*).

2. Fact must be such as party could not get knowledge of by diligent inquiry.

2. It is not, however, sufficient in all cases to give the party relief, that the fact is material; but the fact must also be such as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For, if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.

3. Party having knowledge must have been under an obligation to discover the fact.

3. In cases where one of the contracting parties has knowledge of a fact material to the contract which he does not communicate to the other, it is necessary, in order that the latter may set aside the transaction on the ground of such concealment, that the former should have been under an obligation, not merely moral, but legal or equitable, to make the discovery.

4. Where means of information are equally open to both, and no confidence reposed, no relief.

4. Where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment with regard to a subject-matter, where there is no confidence reposed, but each party is dealing with the other at arm's length, equity will not relieve. And, therefore, where the fact (not being a fact amounting to the entire subject-matter of the contract) is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties

---

(*g*) *Hore v. Becker*, 12 Sim. 465; *Cochrane v. Willis*, L. R. 1 Ch. 58.



have acted with entire good faith, a court of equity will not interpose (r).

The general ground upon which all these distinctions proceed is, that mistake or ignorance of facts in parties is a proper subject of relief only where it constitutes a material ingredient in the contract of the parties, or disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference (s).

General summary of the principles of relief.

It is a general rule of law that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law, or to give effect to a written instrument which is defective in any particular, which, by law, is essential to its validity; or to contradict, alter, or vary a written agreement, either appointed by law or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites (t). But, upon principle, oral evidence is admissible to show that either by accident, mistake, or fraud, a written agreement has not been constituted the depository of the intention and meaning of the parties. To enforce the performance of an agreement under such circumstances would be the highest injustice—it would be to allow an act, originating in innocence, to operate ultimately as a fraud, by en-

Oral evidence admissible to prove accident, mistake, or fraud.

(r) *Mortimer v. Capper*, 1 Bro. C. C. 158, 6 Ves. 24; *Ainslie v. Medlycott*, 9 Ves. 13.

(s) *Jones v. Clifford*, L. R. 3 Ch. Div. 779.

(t) 3 Starkie on Ev. 753.

abling the party who receives the benefit of the mistake or accident, to resist the claims of justice, under shelter of a rule framed to promote it (*u*).

The general rule, as to the admissibility of evidence in cases of mistake, may be thus stated :—Where, by mistake, an instrument *inter vivos* is not what parties intended, or there is a mistake in it, other than a mistake in law, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted by the other side (*v*), or is evident from the nature of the case, or from the rest of the deed, equity will rectify the mistake (*w*).

Mistake implied from nature of the case.

Courts of equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. Thus, a partnership debt has been treated in equity as the several debt of each partner, though, at law, it is the joint debt of all; because in such cases, all have had a benefit from the money advanced, or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay (*x*).

Exception to last stated principle.

But where the inference of a several original debt or liability does not exist, a court of equity will not interfere unless there is evidence of mistake. The Master

---

(*u*) *Murray v. Parker*, 19 Beav. 308.

(*v*) *Davis v. Symonds*, 1 Cox. 404; *Russel v. Dary*, 6 Gr. 165.

(*w*) Sm. Man. 49; *Murray v. Parker*, 19 Beav. 305; *Fowler v. Fowler*, 4 De G. & Jo. 250; *Townshend v. Stangroom*, 6 Ves. 333.

(*x*) *Sumner v. Powell*, 2 Mer. 36; *Deraynes v. Noble*, 1 Mer. 538; and see *Kendall v. Hamilton*, 3 C. P. Div. 403, and on appeal 4 App. Ca. 504 (the true nature of a partnership debt).

of the Rolls, in *Sumner v. Powell* (y), thus expresses himself:—"It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. . . . *When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived.* . . . But in this case the covenant is purely a matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken. . . . It is not attempted to be shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. *There is nothing but the covenant itself, by which its intended extent can be ascertained.* There is no ground, therefore, on which a court of equity can give it any other than its legal operation and effect" (z).

There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memoranda of the agreement. This is strongly illustrated in cases of marriage settlements. With reference to these, the following cases may occur:—

(b.) Cases in which equity relieves against mistake of fact.  
(1.) RECTIFICATION OF MISTAKES IN MARRIAGE SETTLEMENTS.

(aa.) Both the marriage articles, as well as the definitive settlement, may exist before the marriage. In this case, if the articles and the settlement vary in their terms, the settlement will in general be considered the binding instrument, and will not be controlled by the articles, because, as observed in *Legg v. Goldwire* (a), "When all parties are at liberty, the settlement will be taken as a new agreement."

(aa.) Both marriage articles and settlement before marriage.

(bb.) But where the settlement, though made before (bb.) Where

(y) 2 Mer. 36.

(z) *Richardson v. Horton*, 6 Beav. 187; *Underhill v. Horwood*, 10 Ves. 227-8; *Rawstone v. Parr*, 3 Russ. 424, 539.

(a) 1 L. C. 17.

pre-nuptial settlement purports to be in pursuance of the articles. marriage, purports to be *in pursuance of the articles* entered into before marriage, and there is a variance, the settlement will be rectified in accordance with the articles (*b*).

(*cc.*) Extrinsic evidence admissible to show that pre-nuptial settlement was made in pursuance of articles. (*cc.*) And even although a settlement made before marriage contains no reference to the articles, yet if it can be shown that the settlement was intended to be in pursuance of the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from a mistake, the court will reform the settlement and make it conformable to the articles as expressing the real intention of the parties (*c*).

(*dd.*) Settlement after marriage. (*dd.*) Where the settlement is made after marriage, it will, in all cases, whether purporting to be made in pursuance of the pre-nuptial articles or not, be controlled and rectified by them (*d*).

In *Barrow v. Barrow* (*e*), it was held that the erroneous belief by the husband and wife on their marriage that a particular property stood settled, was no ground for rectifying a settlement so as to make it include that property: "where a settlement has been executed which carried into effect a contract framed under a mistaken apprehension of the facts, and a marriage has been actually solemnised on the faith of that contract and that settlement, it would be to substitute a new contract between the parties, and not to carry the real contract into effect, if I were to alter the settlement" (*f*).

---

(*b*) *West v. Erisey*, 1 Bro. P. C. 225; *Bold v. Hutchinson*, 5 De G. M. & G. 568.

(*c*) *Bold v. Hutchinson*, 5 De G. M. & G. 558, 568; *Breadalbane v. Chandos*, 2 My. & Cr. 739.

(*d*) *Legg v. Goldwire*, 1 L. C. 17; *Honor v. Honor*, 1 P. Wms. 123; *Mignan v. Parry*, 31 Beav. 211.

(*e*) 18 Beav. 529.

(*f*) *Wilkinson v. Nelson*, 9 W. R. 393.

The court will not correct an instrument made in consideration of marriage, except on evidence of the mistake of *both* parties. In a case (*g*) where the husband alone laboured under a mistake, Kindersley, V.-C., said:—"The wife is bargaining for herself and her children, and the question always is, What is the contract on which the marriage took place? Here, so far as the wife's contract and understanding are concerned, the contract is the settlement as it stands, though the husband did not understand that it would affect his property" (*h*). Save and except in the case of marriage contracts, the mistake need not be that of *both* parties; the mistake of one will suffice.

Mistake in marriage contracts must be of both parties.

Where an instrument has been delivered up or cancelled under a mistake of the party, and in ignorance of the facts material to the rights derived under it, a court of equity will in all cases grant relief, upon the ground that the party is conscientiously entitled to enforce such rights; and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity (*i*).

(2.) Instrument delivered up or cancelled under a mistake.

As to the remedy offered by equity, in cases of defective execution of powers, arising from mistake, the same general principles are applicable as in cases of defective execution arising from accident (*j*).

(3.) Defective execution of powers.

In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will, or may be made out by a due construction of its terms, for in cases of wills the intention will prevail over the

(4.) Mistakes in wills.

(*g*) *Sells v. Sells*, 1 Dr. & Sm. 45.

(*h*) *Thompson v. Whitmore*, 1 J. & H. 268; *Bradford v. Romney*, 30 Beav. 431.

(*i*) *East India Co. v. Donald*, 9 Ves. 275.

(*j*) See pp. 426-428, *supra*.

words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for parol evidence or evidence dehors the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity (*k*).

(*aa.*) Mere misdescription of legatee will not defeat legacy, unless legacy obtained by a false personation.

(*aa.*) It is clear that in point of law, a mere misdescription of a legatee will not defeat the legacy. But it is equally clear that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which can alone be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy (*l*). Thus, where a woman gave a legacy to a man, describing him as her husband, when, in point of fact, the marriage was void, he having a former wife then living, the bequest was in equity held void (*m*). But when a testator made a will giving all his property to his wife, and appointing her sole executrix, and she (it was alleged) was not his lawful wife, having had a former husband living, the Court of Chancery in a very recent case declined jurisdiction, upon the ground that the matter was one for the Court of Probate (*n*),—a decision which goes far towards cutting away altogether the jurisdiction of the Chancery Division in the matter of mistakes in wills.

(*bb.*) Revocation of legacy on a mistake of facts.

(*bb.*) Where a legacy is given or revoked upon a mistake of facts, equity will give relief. Thus, if a testator revokes legacies to A. and B., giving as a reason that they are dead, and they are in fact living, equity will hold the revocation invalid, and decree the

---

(*k*) *Milner v. Milner*, 1 Ves. Sr. 106; *Stebbing v. Walkey*, 2 Bro. C. 85.

(*l*) *Giles v. Giles*, 1 Keen, 692.

(*m*) *Kennell v. Abbot*, 4 Ves. 808.

(*n*) *Meluish v. Milton*, L. R. 3 Ch. Div. 27, following *Allen v. M'Pherson*, 1 H. L. C. 191.

legacies (o). But a false reason given for a legacy, or for the revocation of a legacy, is not always a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest (p). In *Kennell v. Abbot* (q), the Master of the Rolls thus expresses himself:—"I desire to be understood not to determine, that where, from circumstances not moving from himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection for that child, supposing it to be his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and might entitle him, though he might not fill that character in which the legacy is given. Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field."

Finally, it must be remembered, that in all cases of relief by aiding or correcting defects or mistakes, the party seeking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive. Thus, equity will not give relief as against a *bonâ fide* purchaser for valuable consideration (r).

Cases in which equity will not relieve against a mistake of fact—  
(1.) The party claiming relief must have a superior equity.

(o) *Campbell v. French*, 3 Ves. 321.

(p) *Box v. Barrett*, L. R. 3 Eq. 244.

(q) 4 Ves. 808.

(r) *Powell v. Price*, 2 P. Wms. 535; *Davies v. Davies*, 4 Beav. 54; *Thompson v. Simpson*, 1 Dr. & War. 491.

(2.) No relief  
as between  
volunteers.

Nor will equity relieve one person claiming under a voluntary defective conveyance against another claiming also under a voluntary conveyance, but will leave the parties to their rights at law (*s*).

(3.) Or where  
defect is  
declared fatal  
by statute.

Nor will the remedial powers of courts of equity extend to the supplying of any circumstances, for the want of which the legislature has declared an instrument void; for otherwise, equity would in effect defeat the very policy of the legislative enactments (*t*).

---

(*s*) *Moodie v. Reid*, 1 Mad. 516.

(*t*) *Hibbert v. Rolleston*, 3 Bro. C. C. 571; *Dixon v. Ewart*, 3 Mer. 322.



## CHAPTER III.

## ACTUAL FRAUD.

It may be laid down as a general rule that courts of Fraud. equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, the common law courts. There are a variety of In what cases cases of fraud for which the common law affords complete and adequate relief, and with reference to these relief given in equity. cases, Chancery may be said to possess a general and perhaps a universal *concurrent* jurisdiction. That court would not, however, have readily interfered to stay proceedings at law, where the plaintiff's case in equity might have been pleaded as a defence to the action, and complete justice might thereby be done at law (a) ; and, of course, since the Judicature Acts, equity cannot now stay any proceedings at law, but the parties may move (in a proper case) to have the action transferred to the Chancery Division. Moreover, there were many cases in which fraud was utterly irremediable at law, and over these courts of equity had an exclusive jurisdiction, and they still in substance retain it.

"As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a court of equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded No invariable rule."

---

(a) *Hoare v. Bremridge*, L. R. 8 Ch. 22.

by new schemes, which the fertility of man's invention would contrive" (b).

To attempt, therefore, the definition of a subject so varied and diversified in its forms as fraud, would scarcely be judicious or useful, if it were possible. The mode and extent of the equity jurisdiction over fraud will best be illustrated by the examination of a few of the more marked classes of cases, in which the principles which regulate the action of courts of equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

Equity acts upon weaker evidence than law in inferring fraud.

Before, however, proceeding to those subjects it may be proper to observe that although courts of law, equally with courts of equity, hold that fraud is not to be presumed, the latter courts used to act upon circumstances as presumptions of fraud, where courts of common law would not have deemed them satisfactory proofs. In other words, courts of equity would grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law (c). Or, to express the matter rather more fairly, various circumstances (which at law would not have weighed materially with a jury) were permitted by the Vice-Chancellor, drawing inferences from his varied experience of like transactions, to influence his mind in arriving at his own conclusions upon the case; for the student should always bear in mind, that nothing is or can be evidence in equity which is not evidence also at law.

---

(b) Park's Hist. of Chan. 508.

(c) *Chesterfield v. Janssen*, 1 L. C. 551; *Fullager v. Clarke*, 18 Ves. 483.

The subject of fraud may be divided into two sections,—Actual Fraud and Constructive Fraud.

An Actual Fraud may be defined as something said, <sup>Actual fraud.</sup> done or omitted, with the design of perpetrating what the party must have known to be a positive fraud (*d*).

Actual frauds are of two kinds (*e*)—

Of two kinds.

I. Frauds arising irrespectively of any peculiarity in the position of the injured party; and,

II. Frauds arising chiefly from a consideration of the peculiar position of the injured party.

I. (*a*.) One of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation, or *suggestio falsi*. <sup>I. Arising irrespectively of position of injured party. (*a*.) Misrepresentation.</sup> With reference to this subject the following propositions may be laid down:—

Where a party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him or to obtain an undue advantage over him, in every such case there is a positive fraud, in the truest sense of the term (*f*). And what is more, every man must be held responsible for the consequences of a false representation made by him to another, upon which a *third person* acts, and so acting is injured or damnified; <sup>Where the party makes it intentionally.</sup> *provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss, and provided the injury be the immediate and not the remote consequence of the representation thus made* (*g*). <sup>Misrepresentation made with intent to mislead a third party.</sup>

(*d*) Sm. Man. 56.

(*e*) Sm. Man. 58.

(*f*) *Hill v. Lane*, L. R. 11 Eq. 215.

(*g*) *Barry v. Croskey*, 2 Johns. & Hem. 22; *Attorney-General v. Ray*, L. R. 9 Ch. 397.

Where party did not know his assertion to be true.

And not only does fraud exist where the statements are known to be false by those who make them, but a case of fraud is also constituted where statements, false in fact, are made by persons who do not know them to be true or false, or who believe them to be true, if, in the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered the fact, which negatives the representation made (*h*).

What misrepresentations entitled to relief.

As a matter of conscience, any deviation from the most exact and scrupulous sincerity is contrary to the good faith that ought to prevail in contracts. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far short of the principles deducible *ex æquo et bono*; and with reference to the concerns of human life, they endeavour to aim at mere practical good and general convenience. Accordingly, therefore, a misrepresentation, in order to justify the rescission of a contract, must be *as to some material fact constituting an inducement or motive to the act or omission of the other party*. "To use the expression of the Roman law, it must be a *fraus dans locum contractui*, that is, a misrepresentation giving occasion to the contract; the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into the contract; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether (*i*).

(1.) Misrepresentation must be of some material fact, *i.e.*, it must be a case of *fraus dans locum contractui*.

(2.) Misrepre-

In the next place, the misrepresentation must (at

---

(*h*) *Pulsford v. Richards*, 17 Beav. 94; *Rawlins v. Wickham*, 1 Giff. 355; 3 De G. & Jo. 304.

(*i*) *Pulsford v. Richards*, 17 Beav. 96.

least, in cases of vendor and purchaser) be not only in something material, but it must be something in regard to which the one party places a known trust or confidence in the other.

sentation must be of something in which there is a confidence reposed.

For if the purchaser, choosing to judge for himself, does not avail himself of the knowledge, or means of knowledge, open to him or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations, for the rule in such a case is *caveat emptor*. To this ground of unreasonable indiscretion and confidence, may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals, as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts. *Simplex commendatio non obligat*. Further, the alleged misrepresentation must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust the other, but to rely on his own judgment.

Mere puffing, with opportunity to examine, is no misrepresentation.

In the next place, the party must be misled by the misrepresentation; for if he knows it to be false when made it cannot influence his conduct, and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances (*j*). And further, the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage (*k*).

(3.) The party must be misled by the representation to his prejudice.

(*j*) *Nelson v. Stocker*, 4 De G. & Jo. 458.

(*k*) *Slim v. Croucher*, 1 De G. F. & J. 518; *Fellowes v. Gwydyr*, 1 Sim. 63.

Fraud, consisting in misrepresentations by directors of companies.

In the case of misrepresentations made by the directors of joint-stock and other companies, the company is responsible for the damage to the extent of the profits it has made thereby, and otherwise the remedy is against the directors personally (*l*). Further, the defrauded person may in such a case recover, or (as the case may be) prove for, the amount paid by him to the company (*m*). As regards the fraudulent directors, they are jointly and severally liable, and the action may therefore be brought against one or more of them alone without the other or others (*n*). But, *nota bene*, no action lies against the executor of a deceased fraudulent director, unless to the extent (if any) that his estate has profited thereby (*o*).

Remedy, where misrepresentation can be made good, and where it cannot.

Where a person has been induced to enter into a contract by a material misrepresentation of the other party, the latter shall be compelled to make it good at the option of the former, if the representation be one which can be made good; if not, the person deceived shall be at liberty to avoid the contract (*p*).

Defences against action :  
(*r*.) The plaintiff was *particeps fraudis*.

A person cannot avail himself of what has been obtained by the fraud of another, unless he is not only free from any participation in the fraud, but also has given some valuable consideration (*q*). Otherwise, he who takes the property, as was said in *Bridgeman v. Green* (*r*), "must take it tainted and infected with the imposition of the person procuring the gift: his partitioning and cantoning it out amongst his relations

(*l*) *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145.

(*m*) *Allison's case*, L. R. 15 Eq. 394.

(*n*) *Parker v. Lewis*, L. R. 8 Ch. App. 1035.

(*o*) *Peek v. Gurney*, L. R. 6 H. L. 377.

(*p*) *Pulsford v. Richards*, 17 Beav. 95; *Rawlins v. Wickham*, 3 De G. & Jo. 304, 322; *Attorney-General v. Ray*, L. R. 9 Ch. 397.

(*q*) *Scholefield v. Templer*, 4 De G. & Jo. 433; *Vane v. Vane*, L. R. 8 Ch. 383.

(*r*) *Wiln.* 64.

and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

The defrauded party may, by his subsequent acts, with full knowledge of the fraud, deprive himself of all right to relief, as well in equity, as at law; as if with full knowledge of the fraud he gives a release to the party who has defrauded him, or has continued to deal with him after he knew all the facts (s).

(2.) The plaintiff's subsequent ratification.

(b.) Another class of cases for relief in equity, is where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another. A *suppressio veri* is as fatal as a *suggestio falsi*. It is not every concealment, however, even of facts that are material to the interests of a party, which will entitle him to the interposition of a court of equity, and in this respect concealment differs from misrepresentation. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, in respect of which he cannot be innocently silent, and which the other party has a right, not merely *in foro conscientiæ*, but *in foro juridico*, to know (t).

(b.) *Suppressio veri*,—a ground of relief, only where the party was under a legal obligation to disclose.

Thus, it was said by Lord Thurlow in *Fox v. Mackreth* (u), that if A., knowing of a mine on the estate of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase that estate for a price which it would be worth, without considering the mine, the contract would be good. In such cases, the question is not whether an advan-

Purchase of land with mine unknown to vendor, but known to vendee.

(s) St. 203 (a); *Vigers v. Pike*, 8 Cl. & Fin. 562, 630.

(t) *Fox v. Mackreth*, 1 L. C. 123; *Turner v. Harvey*, Jacob, 178.

(u) 2 Bro. C. C. 420.

tage has been taken, which in point of morals is wrong or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also to show some obligation binding the party to make the discovery.

Sale of land subject to incumbrances known only to vendor.

On the other hand, if a vendor should sell an estate knowing he had no title to it, or knowing that there were incumbrances on it of which the vendee was ignorant, the suppression of such a material fact, in respect of which the vendor must know, that the very purchase implied a trust and confidence on the part of the vendee, that no such defect existed, would clearly avoid the sale on the ground of fraud (*v*).

As to intrinsic defect in personal chattels, *caveat emptor*. Unless there be some artifice or warranty. Or vendor was bound to disclose.

In many cases, especially in the case of sales of personal chattels, the maxim *caveat emptor* is applied; and unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, and unless the vendor is under some obligation to make a disclosure, the vendee is understood to be bound by the sale, notwithstanding there may be any intrinsic defects in it known to the vendor, but unknown to the vendee, materially affecting its value, and regarding which the vendor has merely held his tongue. *Nam qui tacet, non videtur affirmare* (*w*).

Silence tantamount to direct affirmation,—but in exceptional cases only, *e.g.*—Cases of insurance.

But there are, on the other hand, certain cases where, from the very nature of the transaction, the silence of the party—his mere concealment of a fact—must import as much as a direct affirmation, and be deemed equivalent to it. Cases of insurance afford a ready

(*v*) *Arnot v. Biscoe*, 1 Ves. Sr. 95, 97; *Edwards v. M'Leay*, 2 Swanst. 287; *Ellard v. Llandaff*, 1 Ball. & B. 241.

(*w*) *Martin v. Morgan*, 1 Brod. & Bing. 289; *Walker v. Symonds*, 3 Swanst. 62.



illustration of this doctrine. In such cases the underwriter necessarily reposes a trust and confidence in the insured, as to all facts and circumstances which are peculiarly within his (the insured's) own knowledge, and which are not of a public and general nature, or which the underwriter either knows or is bound to know. Indeed, most of the facts and circumstances which may affect the risk are generally within the knowledge of the insured only; and therefore, the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And hence, the general principle is, that in all cases of insurance the insured is bound to communicate to the underwriter all facts and circumstances, material to the risk, within his knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract (x).

Inadequacy of consideration, or any other inequality in the bargain, is not to be understood as constituting, *per se*, a ground to avoid a bargain in equity (y). For courts of equity, as well as of law, act upon the ground that every person who is not, from his peculiar circumstances or condition, under disability, is entitled to dispose of his property in such manner, and upon such terms, as he chooses. Besides, the value of a thing is what it will produce, in its nature fluctuating, and depending on a thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to part with it at a particular time. On the other hand, the sole inducement to a purchaser may be the low-

Inadequacy of consideration *per se* will not avoid a contract.

---

(x) *Pole v. Fitzgerald*, 4 Bro. P. C. 439; *De Costa v. Scandret*, 2 P. Wms. 170; *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511. See also *London Assurance Co. v. Mansel*, 11 Ch. Div. 363.

(y) *Abbot v. Sworder*, 4 De G. & Sm. 448; *Harrison v. Guest*, 6 De G. M. & G. 424.

ness of the price ; or the purchaser may have simply accepted the proposals of the vendor, instead of being the originator of the transaction, like a man whose design is to gain a fraudulent advantage over another (z).

Inadequacy may be evidence of fraud, especially an inadequacy shocking the conscience, or an inadequacy coupled with other circumstances of suspicion.

Still, however, there may be such unconscionableness or inadequacy in a bargain as to demonstrate *per se* some gross imposition or undue influence ; and in such cases courts of equity will interfere upon the ground of inadequacy alone. But then such unconscionableness or such inadequacy should be made out as would shock the conscience, and would amount in itself to conclusive and decisive evidence of fraud. And where the inadequacy is not of that shocking character, but there are other ingredients in the case of a suspicious nature, the inadequacy furnishes the most vehement presumption of fraud (a) ; as if proper time is not allowed to the party, and he acts improvidently ; if he is importunately pressed ; if those in whom he places confidence make use of strong persuasions ; if he is not fully aware of the consequences, but is suddenly drawn into the act ; if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition ; in these, and many like cases, if there has been gross inequality in the bargain, courts of equity will set aside the contract at the instance of the party defrauded.

However, suspicious circumstances are many times explained away consistently with truth and fairness, and even an apparent inadequacy may not be a real inadequacy when everything is known. Thus, in *Harrison v. Guest* (b), where, after the death of a

*Harrison v. Guest*,—an

(z) Sm. Man. 64.

(a) *Harrison v. Guest*, 6 De G. M. & G. 424.

(b) 6 De G. M. & G. 424.

vendor, the sale was impeached by his representatives, on the ground that at the time of the sale he was an illiterate, bed-ridden old man of seventy-one years of age, and had acted without independent professional advice, and had conveyed away the property in question, of the value of £400, for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the conveyance, it was held that, in the absence of any fraud, and the evidence showing that he had declined to employ professional advice for himself, such a transaction was not impeachable on the mere ground of the apparent inadequacy of consideration (c).

Moreover, courts of equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo*; as, for instance, in cases of marriage settlements, for the court cannot unmarry the parties (d).

Contracts affected with fraud are in general voidable only, and not void; consequently, such a contract is valid until it is rescinded. The rescission may become impossible after the rights of third parties have intervened. Thus, a fraudulent contract cannot be rescinded after the commencement of the winding up of the company (e). A *de facto* removal of the shareholder's name from the register, or even the commencement of an action for the removal, is, however, a sufficient repudiation of the fraudulent contract.

If the fraudulent contract should in any case be void, then no repudiation of it is required.

---

(c) *Abbot v. Swarder*, 4 De G. & S. 448; *Longmate v. Ledger*, 2 Giff.

157.

(d) *North v. Ansell*, 2 P. Wms. 619.

(e) *Spackman v. Evans*, L. R. 3 H. L. 171; *Oakes v. Turquand*, L. R. 2 H. L. 325.

Occasionally, however, contracts for shares, although fraudulent, are not avoidable at all; thus, if A. by fraud induces B. to buy A.'s shares, and the company is not implicated in A.'s fraud,—then of course the contract will hold good as between B. and the company; and B.'s remedy (if any) is against A. only, and is for a re-transfer of the shares and an indemnity (*f*); and the rule is the same, even if A. be a director of the company.

Frauds, which are so by force of statute merely.

There are a few frauds in relation to companies, which are frauds by force of statute merely. Thus, under the 164th section of the Companies Act, 1862, any conveyance, mortgage, &c., which in the case of an individual trader would be a fraudulent preference on his bankruptcy under the 92d section of the Bankruptcy Act, 1869, is a fraudulent preference also on the winding up of a company. And under the 38th section of the Companies Act, 1867, the non-disclosure of contracts between the promoters of a projected company and the persons contracting with them, if the contracts are of a kind to influence the prospective shareholders, renders the prospectus fraudulent (*g*), the promoters, when at least they are the sole source of information, or are otherwise bound to disclose, being in a sort of fiduciary relation and liable for concealment as well as for misrepresentation (*h*).

II. Cases of fraud arising from the condition of the injured parties.

Free and full consent necessary to every agreement.

II. Cases of fraud arising chiefly from the peculiar condition of the injured parties.

The general theory of the law, in regard to acts done and contracts made by parties, affecting their rights and interests, is that in all such cases there must be

(*f*) Kerr on Fraud, 273.

(*g*) *New Sombbrero Phosphate Co. v. Erlanger*, 6 Ch. Div. 73; 3 App. Ca. 1218.

(*h*) Kerr on Fraud, p. 65; Buckley on Companies Acts, 2d edition, p. 482.

a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. And, therefore, it has been well remarked that every true consent supposes three things: first, a physical power; secondly, a moral power; and thirdly, a serious and free use of them.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. In such cases, the doctrine is now firmly established that courts of equity will not suffer the manifest object of the condition to be defeated by the fraud, or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage (*i*).

Gifts and legacies on condition against marrying without consent.

1. Hence it is that the contracts and other acts of persons *non compos mentis* (not so found by inquisition and *à fortiori* if so found), wherever, from the nature of the transaction, there is not entire good faith, or the contract or other act is not seen to be just in itself, or for the benefit of those persons, will be set aside in a court of equity. But where a contract is entered into with good faith, and is for the benefit of such persons, such as for necessities, courts of equity, as well as of law, will uphold the transaction; also, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase (*j*).

1. Persons *non compos mentis*,—their contracts are usually void.

But a contract with a lunatic in good faith, and for his benefit, will be upheld.

(*i*) *Dashwood v. Bulkeley*, 10 Ves. 245; *Clarke v. Parker*, 19 Ves. 18.  
(*j*) *Manby v. Bewicke*, 3 K. & J. 342.

2. Drunkenness,—amounting to a want of understanding, contracts how affected by.

2. But to set aside any act or contract on account of drunkenness it is not sufficient that the party is under undue excitement or lethargy from liquor. The excitement or lethargy must rise to that degree in which the party is utterly deprived for the time of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part. If there be not that degree of excitement or of lethargy, then courts of equity will not interfere at all, at least upon the mere ground of drunkenness; but, of course, there may have been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, and in that case, the court might relieve. In general, courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained a deed or agreement from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party (unless he was wholly incapacitated as aforesaid) to get rid of his agreement or deed merely on the ground of his intoxication at the time; but they leave the parties to their ordinary remedies at law, unless there is some contrivance or some imposition practised (k).

Parties left to their remedy at law.

3. Imbecile persons.

3. Closely allied to the foregoing are cases, where a person, although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity, or undue influence. In such cases, if the circumstances justify the conclusion that the party has been imposed on or circumvented, the transaction will be held void in equity; and the burden of proof is on the other party, to show that no unfair advantage was

---

(k) *Clarkson v. Kitson*, 4 Gr. 244.

taken of his weakness, and that a fair price was given to him (*l*).

4. Cases of an analogous nature may be easily put, where the party is subjected for the time to undue influence, although in other respects and at other times he is of competent understanding; as where he does an act or makes a contract when he is under duress, or under the influence of extreme terror, or of threats, or of apprehensions short of duress. For in cases of this sort he has no free will, but stands *in vinculis*. And the constant rule in equity is, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him (*m*). Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner justify the court in setting aside a contract by him, on account of some oppression, or fraudulent advantage, or imposition attendant upon it (*n*).

4. Persons of competent understanding under undue influence.

(a.) Duress.

(b.) Extreme necessity.

5. The acts and contracts of infants (not being for necessities) are not as a general rule binding upon them, because the presumption of the law is that they have not sufficient reason or discernment of understanding to bind themselves. There are indeed certain cases in which infants are permitted by law to bind themselves by their acts and contracts; for, not to mention contracts for necessities suitable to their degree and quality, which are, of course, binding upon them, they are also bound by a contract of hiring and services for wages, or by some act which the law requires them to do. But generally infants are favoured by the law, as

(5.) Infants.

(*l*) *Longmate v. Ledger*, 2 Giff. 164.

(*m*) *Evans v. Llewellyn*, 1 Cox, 340; *Hawes v. Wyatt*, 3 Bro. C. C. 158; *M'Cann v. Dempsey*, 6 Gr. 192.

(*n*) St. 239; *Gould v. Okeden*, 4 Bro. P. C. 198; *Farmer v. Farmer*, 1 H. L. Cas. 724; *Boyse v. Rossborough*, 6 H. L. Cas. 2, 49.

well as by equity, in all things which are for their benefit, and are saved from being prejudiced by anything to their disadvantage. But this rule is designed as a shield for their own protection, and not as a means to perpetrate a fraud or injustice on others; at least, not where courts of equity have authority to reach it in cases of meditated fraud (*o*).

There is an important difference between the acts and contracts of infants on the one hand, and those of lunatics, idiots, &c., on the other. The act or contract of a lunatic or idiot is, *ab initio*, void, and can never be validated in any mode. But in regard to the acts and contracts of infants, some are wholly void, others are merely avoidable. Where they are utterly void, they are from the beginning mere nullities, and incapable of operation. But where they are voidable, it is in the election of the infant to avoid them or not, when he arrives at full age. In general, where a contract may be for the benefit, or to the prejudice, of an infant, he may avoid it as well at law as in equity. Where it can never be for his benefit, it is utterly void; and under the Infants' Relief Act, 1874 (*p*), money-lending and money-raising contracts and all other contracts (not being for necessities) are made utterly void, and not confirmable by the infant upon his attaining his full age.

6. *Femes covert* have not a general capacity to contract at law, but may do so as to their separate estate in equity, and as to their statutory separate estate both at law and in equity.

6. In regard to *femes covert* the case is still stronger; for, generally speaking, at law they have no capacity to do any acts, or to enter into any contracts, and such acts and contracts are treated as mere nullities. Courts of equity, however, have broken in upon this doctrine, and have in many respects treated the wife as capable of disposing of her own separate property, and of doing other acts, as if she were a *feme sole*. In cases of this

(*o*) *Lempriere v. Lange*, W. N. 1879, 158.

(*p*) 37 & 38 Vict., c. 62. See *Coxhead v. Mullis*, 3 C. P. Div. 439.



sort, the same principles will apply to the acts and contracts of a married woman, as would apply to her as a *feme sole*, unless the circumstances give rise to a presumption of fraud, imposition, unconscionable advantage, or undue influence. And now under the Married Women's Property Act, 1870, a married woman may maintain an action in her own name for the recovery, and has the same remedies, civil as well as criminal, for the protection of property declared by the Act to be her separate property, as though she were a *feme sole* (q).

---

(q) 33 & 34 Vict., c. 93, s. 11.

## CHAPTER IV.

### CONSTRUCTIVE FRAUD.

Constructive fraud. By Constructive Frauds are meant such acts or contracts as, although not originating in any actual design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as being acts and contracts done *malo animo*.

Three classes. The cases under this head may be divided into three classes.

I. Cases of constructive fraud, so called because they are contrary to some *general public policy, or to the policy of the law*.

II. Constructive frauds, which arise from the abuse of some peculiar, confidential, or fiduciary relation between the parties.

III. Constructive frauds, which unconscientiously compromit, or injuriously affect, or operate substantially as frauds upon the private rights, interests, duties, or intentions of the parties themselves, or of third persons.

I. Construc- I. Cases of constructive fraud, so called because they

are contrary to some general public policy, or to some fixed artificial policy of the law. (1.) Marriage  
contrary to  
policy of the  
law.

Marriage brokage contracts, by which a person engages to give another some reward or remuneration if he will negotiate a marriage for him, are utterly void (a) and incapable of confirmation (b); and money paid pursuant to such contracts may be recovered back in equity (c). (1.) Marriage  
brokage con-  
tracts.

On the same principle, every contract by which a parent or guardian obtains any remuneration for promoting or consenting to the marriage of his child or ward is void (d). (2.) Reward  
to parent or  
guardian to  
consent to  
marriage of  
child.

The same principle pervades that class of cases where persons, upon a treaty of marriage, by any concealment or misrepresentation, mislead other parties, or do acts which are by other secret agreements reduced to mere forms, or become inoperative. Thus, where a man, on the treaty for the marriage of his sister, let her have money privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the payment of it, it was decreed to be delivered up (e). (3.) Secret  
agreements in  
fraud of mar-  
riage.

The same rules are applied to cases where bonds are given, or other agreements made, as a reward for using influence and power over another person to induce him to make a will in favour of the obligor, and for his benefit; for all such contracts tend to (4.) Rewards  
given for  
influencing  
another person  
in making a  
will.

---

(a) *Hall v. Potter*, Show, P. C. 76.

(b) *Cole v. Gibson*, 1 Ves. Sr. 503; *Roberts v. Roberts*, 3 P. Wms. 74.

(c) *Smith v. Bruning*, 2 Vern. 392.

(d) *Keat v. Allen*, 2 Vern. 588.

(e) *Gale v. Lindo*, 1 Vern. 475; *Palmer v. Neave*, 11 Ves. 165; *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Bro. C. C. 543.

deceive and injure others, and encourage artifices and improper attempts to control the exercise of their free judgment (*f*).

(5.) Contracts in general restraint of marriage void.

Contracts in general restraint of marriage are void, as against public policy, and the due economy and morality of domestic life; and so, if a condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry a man who was not seised of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage (*g*).

(6.) Contracts in general restraint of trade void, but not special restraints.

Contracts in general restraint of trade are also void, as tending to promote monopolies, and to discourage industry, enterprise, and just competition. But the same reasoning does not apply to a limited restraint of trade, *e.g.*, not to carry on trade at a particular place, or with particular persons, or for a limited reasonable time; and a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret (*h*).

(7.) Agreements founded on violation of public confidence.

In like manner, agreements which are founded upon violations of public trust or confidence, or of the rules adopted by courts in furtherance of the administration of public justice, are held void. Thus, contracts for

---

(*f*) *Debenham v. Ox*, 1 Ves. 276.

(*g*) *Keily v. Monck*, 3 Ridg. P. C. 205; *Scott v. Tyler*, 2 L. C. 115.

(*h*) *St.* 292; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Benwell v. Inns*, 24 Beav. 307; *Harms v. Parson*, 32 Beav. 328.

the buying, selling, or procuring of public offices (i), As buying and selling offices.  
 agreements founded on the suppression of criminal prosecutions (j), contracts which have a tendency to encourage champerty (k), and generally all agreements founded upon corrupt considerations or moral turpitude, whether they stand prohibited by statute or not, are treated as frauds upon public policy or public law.

By the Companies Act 1862, § 22, shares in joint-stock companies are made freely transferable, the mode of transfer being that prescribed by the regulations of the company. But a transfer that is subject to some reservation in favour of the transferor is no transfer, so as to get rid of liability for calls; such a pretended transfer is, in fact, fraudulent (l). Also, when the directors have (as they usually have) a right of rejecting proposed transferees, any concealment or misrepresentation materially affecting the worth of the proposed transferee would be an *actual* fraud, and not constructive merely, and would render the transfer invalid (i.e., voidable) even although accepted (m); but it is otherwise when the directors have no power of rejection (n).

(8.) Frauds, in relation to the transfer of shares in joint-stock companies.

And again, as between trustees and *cestuis que trust*, the trustee whose name is on the register is liable and not the *cestui que trust*, but the trustee (where the investment is proper) has the usual right of indemnity (o); but where the shares are placed in the name of the trustee only colourably, and for the purpose of

---

(i) *Chesterfield v. Janssen*, 1 Atk. 352; *Hartwell v. Hartwell*, 4 Ves. 811.

(j) *Johnson v. Ogilby*, 3 P. Wms. 277.

(k) *Powell v. Knowler*, 2 Atk. 224; *Reynell v. Sprye*, 1 De G. M. & G. 660.

(l) *De Pass's Case*, 4 De Gex. & Jo. 544; *Hyam's Case*, 1 D. F. & J. 75.

(m) *Ex parte Kintrea*, L. R. 5 Ch. App. 95.

(n) *Battie's Case*, 39 L. J. Ch. 391.

(o) *City of Glasgow Bank Cases*, 4 App. Ca. 547-581.

merely evading the legal liability, the *cestui que trust* would be liable (*p*).

Neither party to an illegal agreement is aided, as a general rule.

Except where agreement is contrary to public policy.

In general, where parties are concerned in illegal agreements, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common fraud, will not interpose to grant any relief, acting upon the well-known maxim, *In pari delicto potior est conditio possidentis* (*q*). But in cases where the agreement is repudiated on account of its being against public policy, the circumstance that the relief is asked by a party who is *particeps fraudis*, is not in equity material. The reason is, that the public interest requires that relief should be given, and it is given to the public through the party (*r*), and not to the party, excepting as an indirect consequence occasionally.

II. Constructive frauds arising from the fiduciary relation.

II. Constructive frauds which arise from the abuse of some peculiar, confidential, or fiduciary relation between the parties.

In this class of cases there is often to be found some intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct fraud. But the principle on which courts of equity act in regard thereto, stands independent of any such ingredients, upon a motive of general public policy. The general principle which governs in all cases of this sort is, that if confidence is reposed, and that confidence is abused, courts of equity will grant relief.

(1.) Gifts from      In the first place, as to the relation of parent and

(*p*) *Cox's Case*, 4 De Gex. Jo. & Sm. 53.

(*q*) *Howson v. Hancock*, 8 T. R. 675; *Osborne v. Williams*, 18 Ves. 379.

(*r*) *St. John v. St. John*, 11 Ves. 535; *Roberts v. Roberts*, 3 P. Wms. 66; *Smith v. Bromley*, Dougl. R. 696; *Rider v. Kidder*, 10 Ves. 360.

child, all contracts and conveyances whereby benefits are secured by children to their parents, or to persons who stand *in loco parentis*, are the objects of the court's jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third parties have acquired an interest under them (s). And where a child, shortly after attaining his or her majority, makes over property to his or her father without consideration, or for an inadequate consideration, equity will require the father to show that the child was really a free agent, and had adequate and independent advice (t). And conversely in a recent Canadian case, a deed of gift, executed by a father infirm in mind and body in favour of one of his sons, was ordered to be given up and cancelled (u).

child to parent void if not in perfect good faith.

Gift by child shortly after minority.

By father when infirm in mind and body.

In the next place, as to the relation of guardian and ward. During the existence of guardianship, the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation becomes thereby actually ended, if the intermediate period be short (v), unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian (w).

(2.) Guardian and ward cannot deal with each other during the continuance of the relation.

Gift by ward soon after the termination of guardianship, viewed with suspicion.

Where, however, the influence as well as the legal Gift upheld

(s) *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; *Baker v. Bradley*, 7 De G. M. & G. 597; *Kempson v. Ashbee*, L. R. 10 Ch. App. 15.

(t) *Savery v. King*, 5 H. L. Cas. 627; *Davies v. Davies*, 4 Giff. 417; *Hannah v. Hodgson*, 30 Beav. 19.

(u) *Mason v. Seney*, 11 Grant, U. C. Chanc. 447.

(v) *Pierce v. Waring*, 1 P. Wms. 121.

(w) *Hatch v. Hatch*, 9 Ves. 297; *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133.

when influence and legal authority have ceased.

authority of the guardian over the ward has completely ceased, and the ward has been put in possession of his property after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian (x).

(3.) *Quasi* guardians. Medical advisers. Ministers of religion.

The same principles are applied to persons standing in the situation of *quasi* guardians, or confidential advisers, as medical advisers (y), or ministers of religion (z), and to every case where influence is acquired and abused, where confidence is reposed and betrayed (a).

(4.) Solicitor and client.

In the next place, as to the relation between solicitor and client. In *Tomson v. Judge* (b), A., who was proved to have entertained feelings of peculiar personal regard for B., his solicitor, conveyed to him certain real estate by a deed purporting to be a purchase-deed; the consideration was expressed to be £100, the value of the real estate being upwards of £1200. B. produced evidence to show that no money passed; that the transaction was never intended to be a purchase, but a gift for his services, and from affection. It was held that the rule is absolute, *that a solicitor cannot sustain a GIFT from his client*, made pending the relation of solicitor and client, and the deed was set aside. Kindersley, V.-C., said:—"Now, as to the cases of PURCHASES by solicitors from their clients, there is no rule of this court to the effect that a solicitor cannot make such a purchase. A solicitor can purchase his client's property even while the relation subsists; but the rule of the court is that

A gift from client to solicitor pending that relation cannot stand. A purchase from client, if there is perfect bona fides, is good.

(x) *Hylton v. Hylton*, 2 Ves. Sr. 549; *Hatch v. Hatch*, 9 Ves. 297.

(y) *Dent v. Bennett*, 4 My. & Cr. 269.

(z) *Nottidge v. Prince*, 2 Giff. 246.

(a) *Smith v. Kay*, 7 H. L. Cas. 751; *Lyon v. Home*, L. R. 6 Eq. 655.

(b) 3 Drew. 306. See also *Morgan v. Minett*, L. R. 6 Ch. Div. 638; *Clarke v. Girdwood*, 7 Ch. Div. 9.



such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair, that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and a stranger. Is the rule with regard to gifts precisely the same, or is it more stringent? Less stringent it cannot be. There is this obvious distinction between a gift and a purchase. In the case of a purchase, the parties are at arm's length, and each party requires from the other the full value of that which he gives in return. In the case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this court with regard to GIFTS than with regard to purchases; and that the rule of this court makes such transactions, that is, of a gift from a client to the solicitor, absolutely void" (c).

It is an established rule, therefore, that a solicitor shall not in any way whatever, in respect of any transactions in the relations between him and his client, make any gain to himself at the expense of his client, beyond the amount of his just and fair professional remuneration (d).

Solicitor must make no more advantage than his fair professional remuneration.

An agreement between a solicitor and client, that a gross sum shall be paid for costs for business already done, is valid. But in this case it behoves the solicitor to use great caution, and to preserve sufficient evidence that it was a fair transaction, and that his client was

Agreement to pay a gross sum for past business is valid.

(c) *Holman v. Loynes*, 18 Jur. 843; *Welles v. Middleton*, 1 Cox, 112; *Hatch v. Hatch*, 9 Ves. 292; *Spencer v. Topham*, 22 Beav. 573; *Gresley v. Mousely*, 4 De G. & Jo. 78; *Lewis v. Hillman*, 3 H. L. Cas. 630.

(d) *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; *O'Brien v. Lewis*, 4 Giff. 221; *M'Cann v. Dempsey*, 1 Gr. 192.

And for future business under 33 & 34 Vict., c. 28.

not under the influence of the pressure arising from the relation of solicitor and client (*e*),—a pressure characterised by Lord Thurlow (*f*) as “the crushing influences of the power of an attorney who has the affairs of a man in his hand.” An agreement by a solicitor to receive a fixed sum for costs for future business was formerly invalid, and would have been set aside even after payment under the agreement (*g*); but under 33 and 34 Vict., c. 28, s. 4, a solicitor may contract with his client as to his remuneration for future services, but every such contract is subject to taxation as a bill of costs, and may (if improper) be set aside.

(5.) Trustee and *cestui que trust*. Trustee must not place himself in a position inconsistent with the interests of the trust. Purchase by trustee from *cestui que trust* cannot be upheld.

In the next place, with regard to the relation of trustee and *cestui que trust*, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it. It is a consequence of this rule, that a purchase by a trustee from his *cestui que trust*, even although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*; and, as observed by Lord Eldon (*h*), “it is founded upon this, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys an estate, and by the knowledge acquired in that character discovers a valuable coal-mine under it, and, locking that up in his own breast, enters into

(*e*) *Morgan v. Higgins*, 1 Giff. 277.

(*f*) *Welles v. Middleton*, 1 Cox. 125.

(*g*) *In re Newman*, 30 Beav. 196.

(*h*) *Ex parte Lacey*, 6 Ves. 627.

a contract with the *cestui que trust*; if he chooses to deny it, how can the court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded" (i).

It has been decided, however, that "a trustee may buy from the *cestui que trust*, provided there is a clear and distinct contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee" (j). And, in fact, the rule as expressed by Lord Eldon in the words quoted above, would at the present day hold good (if at all) in the case only of a trustee *for sale* purchasing from his *cestui que trust* without the leave of the court to bid.

Except on a clear and distinct and fair contract, that the *cestui que trust* intended the trustee to purchase.

But although it is a general rule that a trustee cannot except in exceptional cases purchase from himself, as it has been said, there is no objection to his purchasing from his *cestui que trust*, who is *sui juris*, and who has discharged him from the obligation which attached upon him as a trustee; but even such a transaction will be watched by the court "with infinite jealousy" (k).

Trustee may purchase from *cestui que trust* who is *sui juris*, and has discharged him.

A trustee is never permitted to partake of the bounty of his *cestui que trust*, except under circumstances which would make the same valid, if it were a case of guardianship. The relation must have in fact ceased, and it must be proved that the influence arising from that relation has also ceased.

Gift to trustee treated on same principles as one between guardian and ward.

(i) *Hamilton v. Wright*, 9 C. & F. 111, 123-5; *Ingle v. Richards*, 28 Beav. 361; *Randall v. Errington*, 10 Ves. 423; *Campbell v. Walker*, 5 Ves. 682; 13 Ves. 601.

(j) *Coles v. Trecothick*, 9 Ves. 234; *Denton v. Donner*, 23 Beav. 285.

(k) *Ex parte Lacey*, 6 Ves. 626; *Fox v. Mackreth*, 1 L. C. 123.

(6.) Principal and agent.

Entire good faith and complete disclosure necessary in dealings between principal and agent.

Agent cannot make any secret profit out of his agency.

In the next place, as to the relation of principal and agent, the same principles are generally applicable. Agents are not permitted to become secret vendors or purchasers of property which they are authorised to buy or sell for their principals (*l*), or indeed to deal validly with their principals in any case, *except where there is the most entire good faith, and full disclosure of all facts and circumstances*, and an absence of all undue influence, advantage, or imposition (*m*). And if an agent employed to make a purchase, purchase for himself, he will be held a trustee for his principal (*n*). Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal, to make any profit out of the transaction (*o*).

(7.) Miscellaneous fiduciary persons. Counsel, auctioneers, &c.

And the principles which apply to trustees, agents, and others, apply with almost equal force to other persons standing in confidential or fiduciary situations, as to counsel, agents, assignees and solicitors of a bankrupt's estate, auctioneers, and creditors who have been consulted as to the sale (*p*).

Debtor, creditor, and sureties.

Entire good faith is required between debtor and creditor and sureties. And if a creditor does any act affecting the surety; or if he omits to do any act which he is required to do by the surety, and is bound to do, and that act or omission proves injurious to the surety; or if the creditor enters into any stipulations

(*l*) *Lowther v. Lowther*, 13 Ves. 103; *Charter v. Trevelyan*, 11 C. & F. 714; *Walsham v. Stainton*, 1 De G. J. & S. 678.

(*m*) St. 315; *Dally v. Wonham*, 33 Beav. 154; *De Bussche v. Alt*, 8 Ch. Div. 286.

(*n*) *Lees v. Nuttall*, 1 Russ. & My. 53; *Taylor v. Salmon*, 4 My. & Cr. 134.

(*o*) *East India Co. v. Henchman*, 1 Ves. Jr. 289; *Bentley v. Craven*, 18 Beav. 75; *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; *Beck v. Kantorowicz*, 3 K. & J. 230; *The Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189.

(*p*) *Pooley v. Quilter*, 2 De G. & Jo. 327; *Cartcr v. Palmer*, 8 C. & Fin. 657; *Ex parte Holyman*, 8 Jur. 156; *Kerr v. Bain*, 11 Gr. 423; *M'Pherson v. Watt*, L. R. 3 App. 254.

with the debtor unknown to the surety, and inconsistent with the terms of the original contract, the surety may set up such act, omission, or contract, as a defence to any suit brought against him in law or equity (*q*).

III. Constructive frauds which unconscientiously compromise or injuriously affect or operate substantially as frauds upon the private rights, interests, or duties of the parties themselves, or of third persons.

III. Constructive frauds, as being unconscientious or injurious to the rights of third parties.

To this class may be referred many of those cases arising under the Statute of Frauds, which requires certain contracts to be in writing to give them validity. In the construction of that statute, a general principle has been adopted, that as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, where, from fraud, a contract of this sort has not been reduced into writing, but has been suffered to rest in confidence or in parol communications between the parties, courts of equity will enforce it against the party guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute (*r*).

(1.) If contract not put into writing through fraud of a party, he cannot set up Statute of Frauds as a defence.

Common sailors being so extremely generous, improvident, and credulous, and therefore liable to be imposed upon, equity views their contracts respecting wages and prize-money with great jealousy; and generally grants them relief, whenever any inequality appears in the bargain, or an undue advantage has been taken (*s*).

(2.) Common sailors,—contracts by.

(*q*) *Sm. Man.* 84.

(*r*) *Montacute v. Maxwell*, 1 P. Wms. 619; *Att.-Gen. v. Sitwell* t, You. & Coll. Exch. Ca. 583; *Hussey v. Horne Payne*, 4 App. Ca. 311.

(*s*) *Dow v. Wheldon*, 2 Ves. Sr. 516.

(3.) Bargains  
with heirs and  
expectants.

Bargains with heirs, reversioners, and expectants, during the life of their parents or ancestors, will be relieved against, unless the purchaser can show that a fair price was paid; for fraud in this class of cases is usually though not always presumed from inadequacy of price (*t*). And this rule is founded on good sense. The very fact of the expectant coming into the market to sell his expectancy, shows that he is not in a position to make his own terms, and that he is more or less in the power of the purchaser; in all such cases, therefore, actual distress need not be proved; a court of equity presumes that there is distress, and that is equivalent to saying, that the party has not that full power of deliberate consent which is essential to a valid contract. The onus, therefore, lies upon the person dealing with the reversioner or expectant, to show that the transaction is reasonable and *bonâ fide*.

Jurisdiction  
under 32 & 33  
Vict., c. 4.

The jurisdiction of courts of equity in these cases is not affected by the 32 and 33 Vict., c. 4, which enacts that no purchase, made *bonâ fide*, of a reversionary interest, shall be set aside *merely on the ground of under value* (*u*).

Knowledge of  
person stand-  
ing *in loco*  
*parentis* does  
not *per se*  
make such  
transactions  
valid.

It would seem that the fact that the father or other person standing *in loco parentis* was aware of or took part in the transaction does not necessarily make that valid which would otherwise be void. It will at the most raise a presumption in favour of the *bonâ fides* of the parties. If, therefore, a father, being unable to supply his son's necessities, assists and protects him in raising money from strangers, the son, in such a case, having in his father's advice presumptively the

---

(*t*) *Peacock v. Evans*, 16 Ves. 512; *Hincksman v. Smith*, 3 Russ. 433; *Aylesford v. Morris*, L. R. 8 Ch. 484; *In re Slater's Trusts*, 11 Ch. Div. 227.

(*u*) *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 11 Eq. 265; L. R. 6 Ch. 665.

best security for obtaining the fair market value of what he sells, the court may perhaps infer that a bargain made under such circumstances was fair and for full value (*v*).

It is upon similar principles that *post obit* bonds, (4.) *Post obits*, and other securities of a like nature, are set aside when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of ready money by the obligor, to pay a sum exceeding the sum so received, and the ordinary interest thereof, on the death of the person from whom he, the obligor, expects to become entitled to some property. If in other respects these contracts are perfectly fair, courts of equity will permit them to have effect as securities for the sum to which *ex æquo et bono* the lender is entitled; for he who seeks equity must do equity.

Where tradesmen and others have sold goods to young and expectant heirs at extravagant prices, and under circumstances demonstrating imposition, or undue advantage, or an intention to connive at secret extravagance, courts of equity have reduced the securities, and cut down the claims to their reasonable and just amount. (5.) Tradesmen selling goods at extravagant prices.

In all these cases where, after the pressure of necessity has been removed, the party freely and deliberately, and upon full information, confirms the precedent contract, or other transaction, courts of equity will generally hold him bound thereby; for if a man is fully informed, and acts with his eyes open, he may, by a new agreement, bar himself from relief. (6.) The party injured may acquiesce after the pressure of necessity has ceased.

Another class of constructive frauds consists of those cases where a man designedly or knowingly produces (6.) Knowingly producing a false impres-

---

(*v*) *King v. Hamlet*, 2 My. & K. 456; *Talbot v. Staniforth*, 1 J. & H. 502; *King v. Savery*, 1 Sm. & G. 271; 5 H. L. Cas. 627.

sion to mislead a false impression on another, who is thereby drawn into some act or contract injurious to his own rights or interests. There can be no real difference in effect between an express representation and one that is naturally or necessarily implied from the circumstances. The wholesome maxim of the law is, that the party who enables another to commit a fraud is answerable for the consequences (*w*); and the maxim, *Fraus est celare fraudem* is, with proper limitations in its application, a maxim of general justice (*x*). Thus, if a man having a title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, the former so standing by, will be bound by the sale (*y*). On the occasion of a loan upon the security of a lease, which the borrower represented himself as entitled to have granted to him for ninety-nine years, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor, being apprised of the requisition and its object, signed the required intimation. The loan was made upon the faith of it, and afterwards the lessor granted a lease, which was then mortgaged by the borrower to the lender. It turned out that the lessor had, some time before, demised the same premises for the same term to the borrower, by whom it had since been assigned for value. It was held that the court had jurisdiction to direct repayment by the lessor to the lender of the sum which he had advanced, with interest, although the lessor was not shown to have been guilty of any conscious active fraud, or of having done more than *forgotten the previous lease* when he made the misrepresentation and granted

One who enables another to commit a fraud is answerable. A man who has a title to property standing by and letting another purchase or deal with it, is bound.

Even though there be no fraud, but only forgetfulness.

(*w*) *Rice v. Rice*, 2 Drew. 73.

(*x*) *Rodgers v. Rodgers*, 13 Gr. 143.

(*y*) *Teasdale v. Teasdale*, Sel. Ch. Cas. 59; *Cawdor v. Lewis*, 1 You. & Coll. Ex. Ca. 427.



the second lease (2). In this case the borrower was, of course, guilty of an actual fraud; but the alternative and more direct remedy against him was probably worthless.

Agreements whereby parties engage not to bid against each other at a public auction, especially where the same is directed or required by law, are held void, for they are unconscientious, and have a tendency to cause the property to be sold at an undervalue. On the other hand, if underbidders or puffers are employed at an auction to enhance the price, and to deceive other bidders, and they are in fact misled, the sale will be held void as against public policy (a). But now by 30 and 31 Vict., c. 48, s. 6, the vendor, if he reserves to himself the right in the particulars or conditions of sale, may bid in person or by one agent at the sale (b).

(7.) Agreements at auctions not to bid against one another.

Puffer at sale by auction.

Under 30 & 31 Vict., c. 48.

If a creditor who is party to a composition deed has obtained a secret and undue advantage as a condition of signing the deed, and has thus decoyed other innocent and unsuspecting creditors into signing the deed of composition, which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors, it is a fraud upon the policy of the law. And such secret arrangements are utterly void, even as against the assenting debtor or his sureties, and money paid under them is recoverable back (c).

(8.) Fraud upon consenting creditors to a composition deed.

In every transaction where a person obtains by donation a benefit from another to the prejudice of that other person, and to his own advantage, if the

(9.) A person obtaining a donation must always be pre-

(2) *Slim v. Croucher*, 1 De G. F. & Jo. 518.

(a) Sugd. V. & P. 9.

(b) *Gilliat v. Gilliat*, L. R. 9 Eq. 60.

(c) *Marc Sandford*, 1 Giff. 283.

pared to prove *bond fides*. transaction should afterwards be questioned, he should be able to prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect (*d*). But the cases have not gone so far as to show that the donee, under a voluntary settlement, where no power of revocation is reserved, has thrown upon him in the first instance the onus of showing that the settlement was intended by the donor to be irrevocable (*e*).

(10.) A power must be exercised *bond fide* for the end designed. Secret agreement in fraud of object of power.

Appointment by a father to a sickly infant.

“No point is better established, than that a person having a power of appointment must exercise it *bond fide* for the end designed, otherwise it is corrupt and void” (*f*). Hence when a parent, having a power of appointment among his children, appoints to one or more of them, to the exclusion of the others, *upon a bargain for his own advantage*, equity will relieve against the appointment on the ground of fraud, as where there is a secret understanding that the child should assign a part of the fund to a stranger (*g*), or to the father’s debtors (*h*). So again if a parent, having a power to raise portions for children, and even to fix the time when they are to be raised, appoints to a child during infancy, and while not in want of a portion, especially if the death of the child at the time of the appointment is expected, he will not be allowed, on the child’s death, to derive any benefit from the appointment as the personal representative of that child (*i*).

---

(*d*) *Cooke v. Lamotte*, 15 Beav. 240; *Anderson v. Elsworth*, 3 Giff. 154.

(*e*) *Coutts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44, explained in *Hall v. Hall*, L. R. 8 Ch. App. 430.

(*f*) *Aleyn v. Belchier*, 1 L. C. 415.

(*g*) *Daubeny v. Cockburn*, 1 Mer. 626.

(*h*) *Farmer v. Martin*, 2 Sim. 502; *Curver v. Richards*, 1 De G. F. & Jo. 548; *Salmon v. Gibbs*, 3 De G. & Sm. 343.

(*i*) *Hinchinbroke v. Seymour*, 1 Bro. C. C. 394; *Wellesley v. Mornington*, 2 K. & J. 143; *Roach v. Trood*, L. R. 3 Ch. Div. 429.

Formerly, where a person having a power of appointing property among the members of a class, although with full discretion as to the amount of their respective shares, exercised that power by appointing to one or more of the objects a merely nominal share, such an appointment, although valid at law, was set aside as an illusory appointment, not being exercised *bonâ fide* for the end designed by the donor (*j*). In consequence of the great difficulty and conflict of authority, as to what might be deemed a nominal or illusory share, the legislature interfered in the year 1830, and established in effect that no appointment shall be invalid on the ground merely that an unsubstantial, nominal, or illusory share of the property has been appointed to the objects of the power (*k*). As a consequence of this Act, the appointor might have cut off any appointee "with a shilling," as the phrase went; and now under the Powers Amendment Act, 1874 (*l*), the appointor need not now appoint any share at all to any particular appointee, but may cut him off even without the shilling.

Doctrine of  
illusory ap-  
pointments.

Abolished by  
1 Will. IV.,  
c. 46.

"A man who has induced another to enter into a contract with him by representing an actual state of things as a security for the enjoyment of an interest which he has himself created for valuable consideration, is not at liberty by his own act to derogate from that interest by determinating the state of things which he so held forth as the consideration or inducement for entering into the contract" (*m*).

(11.) A man  
representing a  
certain state  
of facts as in-  
ducement to  
a contract,  
cannot dero-  
gate from it  
by his own  
act.

(*j*) *Wilson v. Piggott*, 2 Ves. Jr. 351.

(*k*) 1 Will. c. 46; 1 Sugd. on Pow. 545.

(*l*) 37 & 38 Vict. c. 37. See *In re Capon's Trusts*, W. N. 1879, p. 25.

(*m*) *Piggott v. Stratton*, Johnson, 341; 1 De G. F. & J. 33.

## CHAPTER V.

## SURETYSHIP.

Suretyship. CASES in which the peculiar remedies afforded by courts of equity constitute the principal ground of jurisdiction, constitute the second great branch of the concurrent jurisdiction as above subdivided, and thereunder fall to be considered the various matters following in this part of the work, and firstly, the matter of suretyship.

Utmost good faith required between all parties.

The contract of suretyship requires the utmost good faith between all the parties to it; for they do not deal with one another at arm's length as in ordinary contracts. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract (*a*).

What concealment of facts by creditor releases surety? The general principle.

It is a question even now not quite settled (or at least not generally or readily understood) as to what concealment of facts—what degree of *suppressio veri*—by the creditor is necessary to annul the obligation of the contract of suretyship. Story lays down broadly that “if a party taking a guarantee from a surety conceals from him facts *which go to increase his risk*, and suffers him to enter into the contract under false impressions as to the real state of facts, such conceal-

---

(*a*) *Davies v. London and Provincial Marine Insurance*, 8 Ch. Div. 469.

ment will amount to fraud ;” and this broad assertion of the rule is no doubt supported by the decided cases, although they or some of them seem very much to narrow the foundation of the doctrine, and to point to the conclusion, that the mere concealment of facts affecting the surety is not in itself a ground for rescinding the contract, unless either the party concealing them was under some obligation to disclose them, or the concealed facts themselves go directly and proximately to vary the liability of the surety. Thus, in the case of *Hamilton v. Watson* (b), it appeared that A. became indebted to the B. Company in the sum of £750; that the B. Company amalgamated with the G. Company, and the latter Company took on itself the rights and liabilities of the former. On the G. Company calling on A. for payment of the debt due from him, A. entered into a bond, with H. as a surety, by which a new cash account should be opened with the G. Company to the amount of £750, H. not being informed of the previous debt. A week after the date of the bond, A. drew out a draft upon the new account with the G. Company for the whole £750 for which H. had become bound, and paid off with it the old debt due to the B. Company. It was held that this was not a sufficient concealment of facts to discharge the surety—that the mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose did not appear to vitiate the transaction at all—that the creditor was under no obligation to volunteer a disclosure of any transaction that passed between him and the other party—that if the surety would guard against particular perils, he must put the question and gain the information required—and that the true criterion as to whether any disclosure ought to be made voluntarily, was to inquire whether there was anything that might not

(1.) Either the fact must have been one which the creditor was under an obligation to discover.  
*Hamilton v. Watson.*

naturally be expected to take place between the parties—that is, whether there was a contract between the debtor and creditor to the effect that his position should be different from that which the surety might naturally expect.

[Rule as to concealment in insurances inapplicable to common suretyships.]

It is to be observed of the last-mentioned case that the amount of the surety's liabilities was not in any way affected by the concealed fact; had it been otherwise, there would probably have arisen an obligation to disclose it. But when the amount of liability is not affected, it has been decided that the rule which governs insurances on ships and on lives as to the concealment of facts does not apply to common suretyships and guaranties—that, in insurances on ships or lives, the rule, that if the assured conceal any material facts known to him, even though without fraud, the policy is vitiated, is peculiar to the nature of such contracts, in which, in general, the assured knows, and the underwriter does not know, the circumstances of the voyage or the state of health (*c*).

Or (2.) the material fact concealed must have been an integral part of the immediate transaction.

But although the law is so far liberal in its rule as to what facts a creditor is bound to disclose, there are cases where it has been held that a concealment of a material fact, *part of the immediate transaction*, discharges the surety. Thus, in *Pidcock v. Bishop* (*d*), it was agreed between the vendors and the vendee of goods that the latter should pay 10s. per ton beyond the market price in liquidation of an old debt due to one of the vendors. The payment of the goods was guaranteed by a third party in the following words:—"I will guaranty you in the payment of £200 *value*, to be delivered to Tickell, in Lightmoor pig-iron." The private bargain between the parties was not com-

(*c*) *North British Insurance Co. v. Lloyd*, 10 Exch. 523; *Wythes v. Labouchere*, 3 De G. & Jo. 593.

(*d*) 3 B. & C. 605.

municated to the surety. It was held that this was a fraud on the surety—that a party giving a guarantee ought to be informed of any private bargain between the vendor and the vendee which might have the effect of varying his responsibility—that the effect of the transaction would be to compel the vendor to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go towards defraying the debt for the payment of which he had made himself collaterally liable, and that such a bargain therefore increased his responsibilities (*e*).

It seems to follow that, as a general rule, a creditor is not bound to inquire into the circumstances under which a third party becomes to him surety for a debt, but that in exceptional circumstances, he will be bound to inquire, as, for example, where the dealings between the parties are such as would reasonably create a suspicion that a fraud is being practised upon the surety. Thus, in *Owen v. Homan* (*f*), A. being largely indebted to B. & Company, and being on the verge of bankruptcy, brought them, on different occasions, bills, &c., signed by himself and his aunt, as surety. The aunt was, *to the knowledge of B. & Company*, a married woman, aged 75, and living apart from her husband. It was held that the circumstances were such as reasonably to create in the minds of the bankers a suspicion of fraud on the part of the debtor towards his aunt; that they could not shelter themselves under the plea that they were not called on to ask and did not ask any questions on the subject, for that, in such cases, wilful ignorance is not to be distinguished in its equitable consequences from knowledge (*g*).

Creditor not bound to inquire as to circumstances of suretyship, if there is no ground to suspect fraud on surety; *secus*, if reasonable ground of suspicion.

(*e*) *Malby's Case*, cited 1 Dow. 294.

(*f*) 4 H. L. Cas. 997.

(*g*) *Maitland v. Irving*, 15 Sim. 437.

Rights of creditor against surety regulated by the instrument of guaranty.

The rights of the creditor as against the principal debtor may or may not depend upon the instrument of guaranty; but the rights of the creditor as against the surety are wholly regulated by the terms of that instrument. When an obligation exists only in virtue of a covenant, its extent can be measured only by the words in which the covenant is expressed (*h*). In all cases, therefore, where a surety is bound by a joint-bond, the court will not reform the joint-bond so as to make it several, upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by the surety that it should be several as well as joint (*i*).

Surety cannot compel creditor to proceed against debtor.

It would seem, that a surety cannot compel the creditor to proceed against the debtor, and practically there is no hardship in the case; (*j*) for at any moment after the debt becomes payable, the surety may himself pay off the creditor, and proceed against the debtor for the money so paid (*k*).

Remedies available for surety.  
(1.) Bill *quia timet* to compel payment by debtor.

But on the other hand, a surety has a right to come into equity, to take proceedings in the nature of *quia timet*, to compel the debtor to pay the debt when due, whether the surety has actually been sued on it or not; for it is "unreasonable that a man should always have a cloud hanging over him" (*l*). But this right only arises where the creditor has a present right to sue his debtor, and refuses to exercise that right (*m*).

(2.) Judicial declaration that surety discharged.

Similarly a surety may file a bill for a declaration that his liability is at an end, where the course of

(*h*) *Sumner v. Powell*, 2 Mer. 35, 36.

(*i*) *Rawstone v. Parr*, 3 Russ. 424 & 539.

(*j*) But see *Newton v. Charlton*, 10 Hare, 646.

(*k*) *Wright v. Simpson*, 6 Ves. 733.

(*l*) *Ranelagh v. Hayes*, 1 Vern. 189; Mitford on Plead. 172; *Antrobus v. Davidson*, 3 Mer. 569; *Wooldridge v. Norris*, L. R. 6 Eq. 410.

(*m*) *Padwick v. Stanley*, 9 Hare, 627.



dealing between principal debtor and creditor has operated as a release (*n*).

Where the surety pays the debt on behalf of the principal debtor, the rule, whether at law (*o*) or in equity, is that he has a right to call upon such debtor for reimbursement. And this right has been put upon the ground of an implied contract on the part of the debtor to repay the money so paid on his account, where there is no express promise creating the right (*p*).

(3.) Action for reimbursement by debtor.

If, in addition to the security given by the surety, the creditor has taken some additional or collateral securities from the principal debtor, courts of equity have held that upon payment of the debt by the surety to the creditor, the surety is entitled to have the benefit, not only of the principal security, but also of all those collateral securities thus given by the debtor to the creditor. Thus, for example, if at the time when the bond of the principal and surety is given, a mortgage is also made by the principal to the creditor as an additional security for the debt, then, if the surety pays the debt, he will be entitled to have an assignment of the mortgage, and to stand in the place of the mortgagee (*q*). But this general rule did not apply to such securities as got back upon payment to the principal debtor, and were, in fact, extinguished by the payment. Such was the case of a bond entered into by the principal debtor and surety to the creditor: on payment by the surety, the obligation on the bond ceased to exist, and consequently the surety could not stand in the shoes of the creditor as to that bond (*r*). But by the Mercantile Law Extension of

(4.) Action for delivery up of securities by creditor to surety on paying the debt.

(*n*) *Wilson v. Lloyd*, 21 W. R. 507.

(*o*) *Toussaint v. Martinnant*, 2 T. R. 105.

(*p*) *Craythorne v. Swinburne*, 14 Ves. 162.

(*q*) St. 499; *Hodgson v. Shaw*, 3 My. & Keen, 190.

(*r*) *Copis v. Middleton*, 1 T. & R. 229; *Hodgson v. Shaw*, 3 My. & K. 190.

right under  
19 & 20 Vict.,  
c. 97, s. 5.

Amendment Act (s), this exception has been abolished, and a surety is now entitled to have assigned to him every judgment, speciality, or security which shall be held by the creditor in respect of such debt, whether such judgment, &c., shall or shall not at law be deemed to have been satisfied by the payment of the debt. But, *nota bene*, this right to the delivery up of collateral securities held by the creditor does not extend to a surety who is such merely because of having endorsed a Bill of Exchange (t).

(5.) Action  
against co-  
sureties for  
contribution.

Where a debt is secured by the suretyship of two or more persons, and one surety pays the whole or part of the debt, he has in equity, and to a certain extent also at law, a right to contribution from his co-surety; and this doctrine of "contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it" (u). Hence it follows that the doctrine of contribution applies whether the parties are bound in the same or in different instruments, provided they are co-sureties for the same principal and in the same engagement, even though they are ignorant of the mutual relation of suretyship; and further, there is no difference if they are bound in different sums, except that the contribution could not be required beyond the sum for which they are respectively bound (v).

Differences  
between law  
and equity,  
as regards  
suretyship,—  
now abolished:  
(1.) Extent of  
remedy over

In certain respects, the jurisdiction at common law used to be less beneficial than the jurisdiction in equity. Thus, where there were several sureties, and one became insolvent, the surety who paid the entire debt could in equity compel the solvent sureties to contri-

(s) 19 & 20 Vict. c. 97, s. 5.

(t) *Duncan Fox & Co. v. North and South Wales Bank*, 11 Ch. Div. 88.

(u) *Dering v. Winchelsea*, 1 L. C. 106; *Coope v. Twynam*, 1 T. & R. 426.

(v) *Dering v. Winchelsea*, 1 L. C. 106; *Whiting v. Burke*, L. R. 6 Ch. 342.

bute towards payment of the entire debt (*w*); but at law he could recover only an aliquot part of the whole, regard being had to the original number of co-sureties (*x*). Suppose, for instance, there were three sureties, and one of them became insolvent, if one of the remaining solvent sureties paid the debt, he might in equity compel the other solvent surety to contribute a moiety; at law he could only recover one-third in any case from the solvent co-surety. But that distinction and all other distinctions between law and equity have now been abolished, and the rules of equity are made to prevail (*y*). It seems, however, that if one of the sureties died, contribution could, and it certainly now can, be enforced against his representatives, both at law and in equity (*z*).

Before equitable pleas were allowed at common law, if it did not appear on the face of the instrument that a person was a surety, but if, on the contrary, it appeared on the face of the bond that the principal debtor and the surety were bound jointly and severally or as primary debtors, parol evidence was inadmissible at law to show that the surety was only a surety (*a*); but in equity parol evidence was always admissible for that purpose (*b*). Such evidence was rendered admissible at law under an equitable defence under the C. L. P. Act, 1854 (*c*), and of course there is now no distinction in that respect between law and equity.

Although the doctrine of contribution is founded

General prin-

(*w*) *Hitchman v. Stewart*, 3 Drew. 271; *Mayor of Berwick v. Murray*, 7 De G. M. & G. 497.

(*x*) *Cowell v. Edwards*, 2 B. & P. 268; *Batard v. Hawes*, 2 Ell. & B. 287.

(*y*) Judicature Act, 1873, s. 25, sub-sect. 11.

(*z*) *Primrose v. Bromley*, 1 Atk. 88; *Batard v. Hawes*, 2 Ell. & B. 287.

(*a*) *Lewis v. Jones*, 4 B. & C. 506.

(*b*) *Craythorne v. Swinburne*, 14 Ves. 160, 170; *Clarke v. Henty*, 3 Y. & C. Ex. Ca. 187.

(*c*) *Pooley v. Harradine*, 7 Ell. & B. 431; *Taylor v. Burgess*, 5 H. & N. 1.

ciples regarding sureties :—  
(1.) Surety may limit his liability by express contract.

upon the general equity of the case, and not upon contract, still a person may by express contract take himself either wholly or partially out of the operation of that doctrine. Thus, where three persons became sureties, and agreed among themselves that if the principal debtor failed to pay the debt, they should pay only their respective aliquot parts; and afterwards one of them became insolvent, and one of the remaining solvent sureties paid the whole debt, it was held that he was entitled to recover only one-third from the other solvent surety (*d*).

(2.) Surety can only charge debtor for what he actually paid.

Where a surety discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt (*e*).

Circumstances discharging the surety.  
(1.) If creditor varies contract with debtor without surety's privity.

A surety will be discharged from his liability, where by acts *subsequent* to the contract for suretyship his position has been essentially changed without his consent. Thus, where a person gave a promissory-note as a surety, upon an agreement that the amount should be advanced to the principal debtor, by draft at three months' date, and the creditor, without the concurrence of the surety, paid the amount at once; it was held that the agreement had been varied, and the surety was therefore discharged (*f*). But if the variation of liability is in reality in relief *pro tanto* of the surety, *e.g.*, part payment by the principal debtor being accepted by the principal creditor in discharge of the whole liability, the surety is not discharged (*g*).

---

(*d*) *Svain v. Wall*, 1 Ch. R. 149; *Craythorne v. Swinburne*, 14 Ves. 165; *Coope v. Twymam*, 1 T. & R. 426.

(*e*) *Reed v. Norris*, 2 My. & Cr. 361, 375.

(*f*) *Bonser v. Cox*, 6 Beav. 110; *Calvert v. Lond. Dock Co.*, 2 Keen, 638; *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 101; *Holme v. Brunskill*, 3 Q. B. Div. 495.

(*g*) *Webster v. Petre*, 4 Exch. Div. 127.

"If a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of *positive contract* between the creditor and the principal debtor, not where the creditor is merely inactive. And the surety is held to be discharged for this reason, because the creditor by giving time to the principal has for the time at least put it out of the power of the surety to consider whether he (the surety) will have recourse to his remedy against the principal debtor or not, and because he, the surety, cannot in fact have the same remedy against the principal as he would have had under the original contract" (*h*). It seems, however, that a surety will not be discharged by the creditor's giving time to the debtor, if the creditor's remedies against the surety are not thereby diminished or affected, but are accelerated, because in such a case, the surety's remedies against the principal debtor remain also unaffected (*i*).

(2.) If creditor gives time in a binding manner to debtor without consent of surety, and thereby affects the remedies of the surety.

*Secus*, if remedies of surety not thereby affected.

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, reserves his right to proceed against the surety; "for when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial" (*j*).

Or, if creditor giving time reserves his rights against surety.

(*h*) *Samuell v. Howorth*, 3 Mer. 272; *Wright v. Simpson*, 6 Ves. 734; *Rees v. Berrington*, 2 L. C. 992; *Bailey v. Edwards*, 4 B. & S. 711; 12 W. R. 337; *Davies v. Stainbank*, 6 De G. M. & G. 679.

(*i*) *Hulme v. Coles*, 2 Sim. 12; *Prendergast v. Devey*, 6 Mad. 124; *Price v. Edmunds*, 10 B. & C. 578.

(*j*) *Webb v. Hewitt*, 3 K. & J. 442; *Boulbee v. Stubbs*, 18 Ves. 26; *Wyke v. Rogers*, 1 De G. M. & G. 408.

(3.) If the creditor releases the principal debtor.

And the rule is the same when the principal debtor purports to be released, but the creditor reserves his rights against the surety. But where the purported release is in general terms, the surety will be discharged, and that not from any equity in his favour, but on principles of bare justice to the principal debtor. For "it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in his turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor" (*k*).

(3a.) If the creditor releases one co-surety.

It seems to be a settled principle at law that a release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others (*l*).

*Secus*, if creditor merely covenants not to sue the principal debtor or one co-surety.

But though a release of one surety is a discharge of his co-sureties, still if the release can be construed as a *covenant not to sue*, it will not operate as a discharge of the co-sureties (*m*). And the same rule applies to a covenant not to sue the principal debtor.

Creditor cannot reserve his rights against surety, if he release the principal debtor, or one co-surety.

Although a creditor upon giving time to the principal debtor, or on covenanting not to sue him, may reserve his right against the sureties, he cannot do so if he give to the debtor what amounts to an *actual release*, for the debt is in the latter case gone at law. It was therefore held that, where there was an agreement between a bond debtor and his creditor for the latter to take all the debtor's property, and to pay the other creditors five shillings in the pound, though it was not a discharge of the bond at law by way of

(*k*) Per Mellish, L. J., in *Nevill's Case*, L. R. 6 Ch. 47.

(*l*) *Cheetham v. Ward*, 1 B. & P. 633; *Nicholson v. Revell*, 4 A. & E. 765; *Ex parte Jacobs*, *In re Jacobs*, L. R. 10 Ch. App. 211.

(*m*) *Price v. Barker*, 4 Ell. & Bl. 777; *Bailey v. Edwards*, 4 B. & S. 761; *Ex parte Good*, *In re Armitage*, L. R. 5 Ch. Div. 46.

accord and satisfaction, still it operated in equity as a satisfaction of the debt, and it was not possible in equity upon such a transaction to reserve any rights against the surety; and any attempt to do so would be void, as being inconsistent with the agreement (*n*).

A surety being entitled on payment of the debt to all the securities which the creditor has against the principal, whether such securities were given at the time of the contract of suretyship, with or without the knowledge of the surety (*o*), or whether they were given after that contract, with or without the knowledge of the surety (*p*), it follows that, if a creditor who has had, or ought to have had, such securities, loses them, or suffers them to get back into the possession of the debtor, or does not make them effectual by giving proper notice (*q*), the surety, to the extent of such security, will be discharged (*r*). So where a creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he had proceeded to enforce, upon a notice by the surety, it was held that the surety was thereby discharged (*s*).

(4.) If creditor loses or allows securities to go back into debtor's hands.

On page 287, *supra*, certain general rules (there given) regarding the marshalling of securities were stated to be applicable as against sureties also (*t*). The order of working out the successive redemptions and

Marshalling of securities,—as against sureties.

(*n*) *Webb v. Hewitt*, 3 K. & J. 438; *Nicholson v. Revell*, 4 Ad. & Ell. 675; *Kearsley v. Cole*, 16 Mees. & W. 128.

(*o*) *Mayhew v. Crickett*, 2 Swanst. 185.

(*p*) *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & Jo. 461; *Lake v. Brutton*, 18 Beav. 34; 8 De G. M. & G. 440; *Pledge v. Buss*, Johnson, 663, 668.

(*q*) *Strange v. Fooks*, 4 Giff. 408.

(*r*) *Capel v. Butler*, 2 S. & S. 457; *Law v. E. I. Co.*, 4 Ves. 824.

(*s*) *Watson v. Alcock*, 1 Sm. & Giff. 319; 4 De G. M. & G. 242; *Mayhew v. Crickett*, 2 Swanst. 185, 190.

(*t*) *Kinnaird v. Webster*, 10 Ch. Div. 139.

foreclosures of mortgaged estates, stated on p. 302, *supra*, and illustrated in *Beevor v. Luck* (u), is applicable also to sureties (v), and is subject, as against sureties also, to the doctrine of consolidation, stated on pp. 317, 318, *supra*.

---

(u) L. R. 4 Eq. 537. And see Minutes (*in extenso*) of the Decree in *Pemberton on Judgments and Orders*, 2d edit. pp. 478-480. See also *Bradley v. Riches*, 26 W. R. 910; 9 Ch. Div. 189.

(v) *Bowker v. Bull*, 1 Sm. N. S. 29; *Fairbrother v. Wodehouse*, 23 Beav. 18, 19. And distinguish *Williams v. Owen*, 13 Sim. 597; *Dawson v. Bank of Whitehaven*, L. R. 6 Ch. Div. 218, reversing S. C. as reported in L. R. 4 Ch. Div. 639



## CHAPTER VI.

## PARTNERSHIP.

COURTS of equity exercise a full concurrent jurisdiction with courts of law in all matters of partnership; indeed it may be said that the jurisdiction of courts of equity is, practically speaking, an exclusive jurisdiction in all cases of any complexity or difficulty. For wherever a discovery, or an account, or a contribution, or an injunction, or a dissolution is sought in cases of partnership, or where a due enforcement of partnership rights, duties, and credits is required, the remedial justice administered by courts of equity is far more complete, extensive, and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner, where no redress whatsoever, or very imperfect redress, could be obtained at law. And the Judicature Act, 1873 (§ 34), has recognised this superiority, by assigning to the Chancery division of the court all matters of partnership, involving either accounts or a dissolution.

Partnership.

Equity has a practically exclusive jurisdiction.

A court of equity will decree the specific performance of a contract to enter into partnership for a fixed and definite period of time (a); but it will not do so when no term has been fixed, for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards (b).

Specific performance of partnership agreement—when and when not decreed.

---

(a) *Buxton v. Lister*, 3 Atk. 385; *England v. Curling*, 8 Beav. 129.  
 (b) *Hercy v. Birch*, 9 Ves. 357; Mr. Swanston's Note to *Crawshaw v. Maule*, 1 Swanst. 511-513.

And it will not decree specific performance, even where a definite term has been fixed, unless there have been acts of part performance (*c*). .

Injunction,—  
when and  
when not  
granted.

(1.) Against  
omission of  
name of  
one of the  
partners.

(2.) Against  
carrying on  
another  
business.

(3.) Against  
destruction  
of partner-  
ship property.

(4.) Against  
exclusion of  
partner.

In like manner, after the commencement and during the continuance of the partnership, courts of equity will in many cases interpose to decree a specific performance of other agreements in the articles of partnership. If, for instance, there be an agreement to insert the name of a partner in the name of the firm, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, courts of equity will grant specific relief by an injunction against the use of any other firm name, not including his name. But the remedy in such cases is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trifling omission (*d*). So where there is an agreement by the partners not to engage in any other business, courts of equity will act by injunction to enforce it; and if profits have been made by any partner in violation of such an agreement in any other business, the profits will be decreed to belong to the partnership (*e*). A court of equity will further interfere by injunction to prevent such acts on the part of any of the partners, as either tend to the destruction of the partnership property (*f*), or to impose an improper liability on the others, or to the exclusion of the other partners from the exercise of their partnership rights,

---

(c) *Scott v. Rayment*, L. R. 7 Eq. 112.

(d) *Marshall v. Colman*, 2 J. & W. 266, 269.

(e) *Somerville v. Mackay*, 16 Ves. 382, 387, 389; *England v. Curling*, 8 Beav. 129.

(f) *Miles v. Thomas*, 9 Sim. 605, 609; *Marshall v. Watson*, 25 Beav. 501.

whether those rights be founded on the law relating to partnerships in general, or on agreement (*g*), and although no dissolution is prayed (*h*).

But it is not to be inferred that courts of equity will in all cases interfere to enforce a specific performance of the articles of partnership, or to issue an injunction against the breach of these articles. Where the remedy at law is entirely adequate, no relief will be granted in equity. So, where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of any disputes, to refer the same to arbitration, courts of equity would not, any more than courts of law, interfere as a general rule to enforce that agreement (*i*). But since the passing of the Common Law Procedure Act, 1854, courts, both of law and of equity, have shown an inclination to enforce agreements for reference under that Act, and to remit parties to the arbitration as their self-chosen exclusive forum (*j*), provided the question in difference is not paramount the agreement for reference (*k*).

Courts of equity will not enforce specific performance of articles where remedy at law is entirely adequate.

Nor of an agreement to refer to arbitration, unless under Common Law Procedure Act, 1854.

A partnership may be dissolved in various ways.

Dissolution of partnership,—modes of.

1. By operation of law. Of events on which by operation of law the partnership is determined, the principal ones seem to be the death of one of the partners, unless there be an express stipulation to the contrary (*l*); the bankruptcy of all or one of the part-

(1.) By operation of law.

(*g*) *Deitrichsen v. Cabburn*, 2 Ph. 59.

(*h*) *Hall v. Hall*, 12 Beav. 414.

(*i*) *Street v. Rigby*, 6 Ves. 815; *British Emp. Shipping Co. v. Somes*, 3 K. & J. 433.

(*j*) *Seligmann v. De Boutillier*, L. R. 1 C. P. 681; *Willesford v. Watson*, L. R. 14 Eq. 572, 20 W. R. 32.

(*k*) *Mulkern v. Lord*, 4 App. Ca. 182.

(*l*) *Gillespie v. Hamilton*, 3 Mad. 251; *Crawshay v. Maule*, 1 Swanst. 495; and see *Backhouse v. Charlton*, 8 Ch. Div. 444.

ners (*m*); the conviction of any one of them for felony (*n*); or a general assignment by one or more of the partners, whether the partnership be determinable at will, or, it seems, even where it is for a definite period (*o*). To these may, perhaps, be added any event which makes either the partnership itself, or the objects for which it was formed, illegal (*p*). In these cases the partnership determines by operation of law from the happening of the particular event, without any option of any of the parties.

2. By agreement of parties.

2. By agreement of parties. By mutual agreement of *all* the partners, the partnership, though for an unexpired term, may be put an end to (*q*).

Partnership at will may be dissolved at any moment.]

Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases; and the partnership will then be deemed to continue only so far as may be necessary for the purposes of winding up its then pending affairs (*r*). But at the same time, the Court of Chancery would restrain an immediate dissolution and sale of the partnership property, if it appeared that irreparable mischief would ensue from such a proceeding (*s*).

Dissolution by event provided for.

A partnership may also expire by the efflux of the time fixed upon by the partners for the limit of its duration (*t*).

Partnership continuing

But in the case of a partnership for a term, if after the term the business is carried on as before, instead

(*m*) *Barker v. Goodair*, 11 Ves. 83, 86; *Crawshay v. Collins*, 15 Ves. 228.

(*n*) 2 Bl. Com. 409; Co. Litt. 391 a.

(*o*) *Heath v. Sansom*, 4 B. & Ad. 172; *Nerot v. Burnard*, 4 Russ. 247.

(*p*) *Esposito v. Bowden*, 7 E. & B. 763, 785; *Dixon on Partnership*, 431, 432.

(*q*) *Hall v. Hall*, 12 Beav. 414.

(*r*) *Peacock v. Peacock*, 16 Ves. 50.

(*s*) *Lindley on Partnership*, 232; *Blisset v. Daniel*, 10 Hare, 493; see *Pothier Partn.* s. 150; also *Levy v. Walker*, 10 Ch. Div. 436.

(*t*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298-307.

of being wound up according to the terms of the articles, or by sale as required by law in the absence of special provisions, the partnership will continue, and will be deemed a partnership at will upon the terms of the original partnership, so far as those terms are applicable (*u*). after term agreed on, is a partnership at will, on old terms.

3. Dissolution by decree of a court of equity. A court of equity will, in many cases, decree a dissolution at the instance of a partner, though he cannot by his own act dissolve the partnership. The following are the principal cases in which, and grounds upon which, the court has decreed a dissolution:— 3. By decree of court.

(*a*.) A partnership may be dissolved as from its commencement, where it has originated in fraud, misrepresentation, or oppression (*v*). Partnership induced by fraud.

(*b*.) If one partner grossly misconducts himself in reference to partnership matters, acting in breach of the trust and confidence between the partners, this will be a ground for a dissolution (*w*). Gross misconduct and breach of trust.

(*c*.) So, if there have been continual breaches of the partnership contract by one of the parties, as if he has persisted in carrying on the business in a manner totally different from that agreed on, the court will dissolve the partnership (*x*). But there must be a substantial failure in the performance of the agreement on the part of the defendant; it is not the office of a court of equity to enter into a consideration of mere partnership squabbles (*y*). Continual breaches of contract.

---

(*u*) *Parsons v. Hayward*, 31 Beav. 199.; 31 L. J. Ch. 666.

(*v*) *Rawlins v. Wickham*, 1 Giff. 355; 7 W. R. 145; *Hue v. Richards*, 2 Beav. 305.

(*w*) *Smith v. Jeyes*, 4 Beav. 503; *Harrison v. Tennant*, 21 Beav. 482.

(*x*) *Waters v. Taylor*, 2 V. & B. 299.

(*y*) *Wray v. Hutchinson*, 2 My. & K. 235; *Anderson v. Anderson*, 25 Beav. 190.

Wilful and permanent neglect of business.

(*d.*) If a partner who ought to attend to the business wilfully and permanently absents himself from it, or becomes so engrossed in his private affairs as to be unable to attend to it, this would seem, independently of agreement, to be a ground for dissolution (*z*).

Extreme disagreements or incompatibility of temper.

(*e.*) And although the court will not dissolve a partnership merely on account of the disagreement or incompatibility of temper of the partners, where there has been no breach of the contract (*a*); yet, if the disagreements are so great as to render it impossible to carry on the business, all mutual confidence being destroyed, there cannot be a doubt that the court will dissolve the partnership (*b*).

Insanity of partner,—whose skill is indispensable.

(*f.*) Whenever a partner, who is to contribute his skill and industry in carrying on the business, or who has a right to a voice in the partnership, becomes permanently insane, a court of equity will dissolve the partnership (*c*). Insanity of a partner is not, however, in the absence of agreement, *ipso facto* a dissolution, but is only a ground (the case being otherwise proper) for dissolution by decree of the court (*d*).

Share in partnership a right to money.

The share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities of the firm have been paid and discharged: and it is this only which on the death of a partner passes to his representatives (*e*).

---

(*z*) *Harrison v. Tennant*, 21 Beav. 482; *Smith v. Mules*, 9 Hare, 556.

(*a*) *Goodman v. Whitcomb*, 1 J. & W. 589, 592; *Jauncey v. Knowles*, 29 L. J. Ch. 95.

(*b*) *Baxter v. West*, 1 Dr. & Sm. 173; *Watney v. Wells*, 30 Beav. 56; *Leary v. Shout*, 33 Beav. 582.

(*c*) *Waters v. Taylor*, 2 V. & B. 303; *Patey v. Patey*, 5 L. J. Ch. N. S. 198; *Anon.* 2 K. & J. 441; *Rowlands v. Evans*, 30 Beav. 302.

(*d*) *Jones v. Noy*, 2 My. & K. 125.

(*e*) *Lindley on Partnership*, 681; *Knox v. Gye*, L. R. 5 H. L. 656; *Noyes v. Crawley*, 10 Ch. Div. 31.

Where a dissolution has taken place, not only will an account be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business, and make sale of the partnership property, so that a final distribution may be made of the partnership effects; but a manager or receiver will not be appointed except with a view to a dissolution (*f*).

Account on dissolution. Receiver appointed only in case of dissolution.

As to decreeing an account where no dissolution is intended or prayed, the general rule is, that where a partner has been excluded, or the conduct of the other party has been such as would entitle the complaining partner to a dissolution as against him, a general account, at any rate up to the time of filing the bill, will be decreed; but that in no case will a continuous account be decreed, as that would be, in part at least, a carrying on of the business by the Court of Chancery (*g*).

Account where no dissolution is prayed.

A partnership, though in a certain sense expiring on any of the events that have been mentioned—such as death, effluxion of time, or bankruptcy of a partner—does not expire to all purposes; for all the partners are interested in the business until all the affairs of the partnership have been finally settled by all (*h*). Hence the partners thus continuing a business are accountable to the rest, not merely for the ordinary profits, but for all the advantages which they have obtained in the course of the business (*i*).

Partner making advantage out of the partnership property, accountable to other partners.

But there is no fiduciary relation between the sur- Representa-

(*f*) St. 672; *Hall v. Hall*, 3 Mac. & G. 79; *Baxter v. West*, 28 L. J. Ch. 169.

(*g*) Dixon on Partnership, 193; St. 671; *Loscombe v. Russell*, 4 Sim. 8; *Fairthorne v. Weston*, 3 Hare, 387.

(*h*) *Crawshay v. Collins*, 2 Russ. 344.

(*i*) *Clements v. Hall*, 2 De G. & J. 173; *Willett v. Blanford*, 1 Hare, 253; *Wedderburn v. Wedderburn*, 22 Beav. 84; 2 Sp. 208. And distinguish *Dean v. M'Dowell*, 8 Ch. Div. 345.

tives of deceased partners entitled to an account, but have no lien.

living partners and the representatives of the deceased partner; therefore, although they may respectively sue each other in equity, their rights are legal rights for an account, and will be barred by the Statute of Limitations (*j*). The representatives, moreover, have no lien on any specific part of the partnership estate, which in the first instance accrues in its entirety to the surviving partners, both at law and in equity.

In equity land forming an asset of the partnership is money.

From the principle that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money, and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties (*k*).

And personal representative takes.

Immaterial whether land has been purchased or devised, so long as "involved in" the business.

Not only are lands purchased out of partnership funds for partnership purposes, treated in equity as personalty (*l*), but the rule is the same in certain cases where lands have been acquired by devise, the question in every case being, as was said by James, L. J., in *Waterer v. Waterer* (*m*), whether or not the lands are "*substantially involved in the business*."

Creditors may, on decease of one partner, go against survivors, or against the estate of deceased.

In cases of partnership debts, on the decease of one partner, the creditors may, at their option, pursue their legal remedies against the survivors or survivor, or resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts

---

(*j*) *Knox v. Gye*, L. R. 5 H. L. 656.

(*k*) *Lindley on Partnership*, 687; *Darby v. Darby*, 3 Drew. 495; *Steward v. Blakeway*, L. R. 4 Ch. 603; *Wylie v. Wylie*, 4 Gr. 278.

(*l*) *Phillips v. Phillips*, 1 M. & K. 649.

(*m*) L. R. 15 Eq. 402; *Lindley on Partnership*, 687.



between the partners themselves, or to the ability of the survivors or survivor to pay (*n*).

The liability of partners, although sometimes called joint and several, differs in important particulars from a joint and several liability. Thus, although the separate estate of the deceased is liable, yet it is liable only as for a joint debt; consequently the separate creditors of the deceased are entitled to be paid their debts in full, before the creditors of the partnership can claim anything from his separate estate (*o*). Hence, a creditor of the partnership, who is also a debtor to the deceased, cannot, in an administration of the deceased's estate, set off his separate debt against the joint debt due to him (*p*). But a joint debt contracted in fraud of any of the partners may, at the option of the creditor, be treated as a joint or as a separate debt (*q*).

Separate creditors paid out of separate estate before partnership creditors.

On the other hand, the creditors of the partnership have a right to the payment of their debts, out of the partnership funds, before the private creditors of the partners. But this preference was, at law, generally disregarded; in equity it was worked out through the equity of the partners over the whole fund (*r*); and now there is no distinction between law and equity in this respect, except that the jurisdiction is assigned exclusively to the Chancery division of the court. The rule is the same even although the partnership is ostensible only (*s*).

Partnership creditors paid their debts out of partnership funds before separate creditors.

(*n*) *Baring v. Noble*, 2 R. & My. 495.

(*o*) *Gray v. Chiswell*, 9 Ves. 118; *Ridgway v. Clare*, 19 Beav. 111; *Ex parte Wilson*, 3 M. D. & De G. 57.

(*p*) *Stephenson v. Chiswell*, 3 Ves. 566.

(*q*) *Ex parte Adamson*, in *re Collicie*, 8 Ch. Div. 807.

(*r*) *Twiss v. Massey*, 1 Atk. 67; *Campbell v. Mullett*, 2 Swanst. 574. And see *Lacey v. Hill*, L. R. 4 Ch. Div. 537, affirmed successively in the Court of Appeal and in the House of Lords.

(*s*) *In re Pulsford*, 8 Ch. Div. 11; *Ex parte Sheen*, 6 Ch. Div. 235.

Two firms having a common partner could not sue one another at law, but might do so in equity.

Another illustration of the beneficial result of equity jurisdiction, in cases of partnership, may be found in the case of two firms dealing with each other, where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the common law in such cases no suit could be maintained at law in regard to any transactions or debts between the two firms (*t*). But there was no difficulty in proceeding in courts of equity to a final adjustment of all the concerns of both firms, in regard to each other; for, in equity, it was sufficient that all parties in interest were before the court as plaintiffs or as defendants, and they need not, as at law, in such a case, have been on opposite sides of the record. In equity, all contracts and dealings between such firms, of a moral and legal nature, were deemed obligatory, though void at law. Courts of equity, in such cases, looked behind the form of the transactions to their substance, and treated the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were, in fact, corporate companies (*u*). And the rules of equity now prevail in these respects in all divisions of the court.

At law, one partner cannot sue his co-partners in a partnership transaction—he may in equity.

Upon similar grounds, one partner could not, at law, maintain a suit against his co-partners to recover the amount of money which he had paid for the partnership, since he could not sue them without suing himself, also, as one of the partnership (*v*), but he might have done so in equity; and now the rule of equity prevails.

(*t*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*u*) *Mainwaring v. Newman*, 2 B. & P. 120; St. 679, 680; *De Tastet v. Shaw*, 1 B. & A. 664.

(*v*) *Wright v. Hunter*, 5 Ves. 792; *Bovill v. Hammond*, 6 B. & C. 151; *Sedgwick v. Daniell*, 2 H. & N. 319; *Atwood v. Maude*, L. R. 3 Ch. 369. And see Brown's Law Dictionary, title *Partnership*.

## CHAPTER VII.

## ACCOUNT.

I. THE action of account was one of the most ancient I. Account.  
forms of action at the common law. But the modes  
of proceeding in that action, although aided from time  
to time by statute, were found so very dilatory, incon- At common  
venient, and unsatisfactory, that as soon as courts of law, dilatory  
equity began (and they began very early) to assume and inconve-  
jurisdiction in matters of account, the remedy at law nient.  
began to decline, and fell into disuse.

At the common law an action of account lay in two When account  
classes of cases :— lay at law.

1. Where there was either a privity in deed by the 1. In cases of  
consent of the party, as against a bailiff, a receiver privity of deed  
appointed by the party; or a privity in law, *ex pro-* or law.  
*visione legis*, as against guardians in socage (*a*), and  
their executors and administrators (*b*).

2. By the law merchant, one naming himself a 2. Between  
merchant, might have an account against another, merchants.  
naming him as a merchant, and charge him as a  
receiver (*c*), or against his executors (*d*).

And the reasons for the disuse of the action of Suitors pre-  
account at common law, and its progress in equity, ferred equity,  
are not hard to find—one ground was, that courts of because of its  
common law could not compel a discovery from the power of dis-  
covery and of  
administration.

(*a*) Co. Litt. 90 *b*.

(*c*) Co. Litt. 172 *a*. ; 11 Co. R. 89.

(*b*) 3 & 4 Anne, c. 16.

(*d*) 13 Edw. III. c. 23.

defendant on his oath; another ground was, that the machinery and administrative powers of the courts of common law were not so well adapted for the purposes of an account as those of the courts of equity.

In what cases equity allows an account.

Courts of common law having failed to give due relief in cases of account, suitors were obliged, in most cases, to come into equity for that purpose. It now becomes necessary to examine in what cases equity will afford such relief. It should be premised, however, that since the coming into operation of the Judicature Acts, 1873-75, the jurisdiction in account has become co-extensive at law and in equity; consequently, that in all matters of account whatsoever, equity now has jurisdiction although the accounts should be ever so simple, and although law would therefore be the more proper forum; and on the other hand, law also now has jurisdiction in all matters of account, even the most complicated, and even when a fiduciary relation is involved in the case. But in all these last-mentioned cases, the equity division is the properer and more convenient jurisdiction; and we propose therefore to set forth the principal of such last-mentioned cases in which an action for an account more properly lies in the equity division.

1. Principal against agent, subject to the statute of limitations.

1. Equity will assume jurisdiction where there exists a fiduciary relation between the parties; as in favour of a principal against his agent, though not in favour of the agent against the principal. The rule is thus stated by Sir J. Leach (e):—"The defendants here were agents for the sale of the property of the plaintiff, and wherever such a relation exists a bill will lie for an account; *the plaintiffs can only learn from the discovery of the defendants how they have acted in the execution of their agency.*" But an agent is not pre-

---

(e) *Mackenzie v. Johnston*, 4 Mad. 373.

cluded from setting up the Statute of Limitations against his principal, unless a confidential relation in the nature of a trust has been created (*f*).

It has been argued that if the principal may commence an action against his agent, the agent may likewise do so against his principal; but the rights of principal and agent are not correlative. The right of the principal rests upon the trust and confidence reposed in the agent, but the agent reposes no such confidence in the principal (*g*).

By analogy to the case of principal against agent, the Court of Chancery decrees an account against the infringer of a patent, on the ground that the patentee may adopt the acts of the defendant as those of an agent. From this principle it follows, that the plaintiff in such a suit must elect between an account and damages. He cannot claim both, and at the same time approbate and reprobate the agency of the defendant (*h*).

Cases of account between trustees and *cestui que trust* may properly be deemed confidential agencies, and are peculiarly within the jurisdiction of courts of equity (*i*).

2. It seems that equity will assume jurisdiction where there are mutual accounts between the plaintiff and the defendant.

As to what are mutual accounts, the best definition is to be found in the judgment in *Phillips v. Phil-*

(*f*) *In re Hindmarsh*, 1 Dr. & Sm. 129; *Burdick v. Garrick*, L. R. 5 Ch. 233.

(*g*) *Padwick v. Stanley*, 9 Hare, 627; *Smith v. Leveau*, 33 L. J. Ch. 167.

(*h*) *Neilson v. Betts*, L. R. 5 H. L. 1.

(*i*) *Docker v. Somes*, 2 My. & Keen, 664.

Agent cannot have an account against his principal.

(*a*). Patentee against infringer.

(*b*). *Cestui que trust* against trustee.

2. Cases of mutual accounts between plaintiff and defendant.

“Mutual accounts”—  
where each of  
two parties  
has received  
and also paid  
on the other’s  
account.

*lips (j)*. “I understand a mutual account to mean not merely where one of the two parties has received money and paid it on account of the other, but *where each of two parties has received and also paid on the other’s account*. I take the reason of that distinction to be, that in the case of proceedings at law, where each of the two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments—a position of the case which, to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to receipts on the one side and payments on the other, and it is a mere question of set-off; but it is otherwise where *each party* has received and paid (*k*).

No account if  
it is a mere  
question of  
set-off.

3. Circum-  
stances  
of great com-  
plication.

3. An action for an account will also lie where there are circumstances of great complication. As to what is the criterion of the amount of complication necessary to give jurisdiction to a court of equity, independently of any other circumstances, the judgment of Lord Redesdale in *O’Connor v. Spaight (l)*, is in point:—“The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all necessary accuracy. . . . This is a principle on which courts of equity constantly act, by taking cognisance

The test is—  
Can the ac-  
counts be  
examined on  
a trial at *Nisi*  
*Prius*?

(j) 9 Hare, 471.

(k) *Padwick v. Hurst*, 18 Beav. 575; *Fluker v. Taylor*, 3 Drew. 183.

(l) 1 Sch. & Lefr. 305.

of matters which, though cognisable at law, are yet so involved with a complex account that it cannot properly be taken at law." But this principle is not quite settled (*m*); and it is by no means to be taken as a universally conclusive criterion, especially as the Common Law judges have a special power conferred on them by the Procedure Act of 1854 (*n*), on a cause coming on at *nisi prius*, to compel a reference to arbitration; and now under the Judicature Acts, 1873-75, and rules thereunder, matters of account as well as other matters may be variously referred to an official or other referee for report (*o*). And the suggested rule, therefore, cannot perhaps be put higher than this—that the difficulty of examining the accounts at *nisi prius* will be a strong circumstance in favour of a resort to the aid of equity. In short, the equity to an account must be judged from the nature and facts of each particular case (*p*).

Compulsory reference to arbitration by 17 & 18 Vict., c. 125, s. 3; and references of various sorts for report under Judicature Acts, 1873-75, and rules.

It is ordinarily a good bar to a suit for an account that the parties have already, in writing, stated and adjusted the items of the account, and struck the balance (*q*). In such a case a court of equity will not interfere, for, under such circumstances, an *indebitatus assumpsit* lies at law, and there is no ground for resorting to equity. If, therefore, there has been an account stated, that may be set up by way of plea, as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a court of equity. But if there has been any mistake, or omission,

Chief defences to suit for an account. (1.) Stated or settled account. Equity will

(*m*) *Taff Vale Rail. Co. v. Nizon*, 1 H. L. Cas. 111; *South-Eastern Rail. Co. v. Martin*, 2 Phill. 758; 1 Hall. & Twells, 69; *Phillips v. Phillips*, 9 Hare, 475.

(*n*) 17 & 18 Vict. c. 125, s. 3.

(*o*) *Longman v. East*, *Pontifex v. Severn*, *Mellin v. Monico*, 26 W. R. 183.

(*p*) *Phillips v. Phillips*, 9 Hare, 475; *South-East. Rail. Co. v. Martin*, 2 Phil. 758; 1 Hall. & Twells, 69.

(*q*) *Dawson v. Dawson*, 1 Atk. 1.

"open" the whole account if there be mistake or fraud; and in other cases particular items only will be examined, *i.e.*, liberty will be given to "surcharge" and "falsify."

or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will, in some cases, direct the whole account to be opened, and taken *de novo*. In other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition, is not shown to affect or stain all the items of the transaction, the court will content itself with allowing the account to stand, with liberty to the plaintiff to surcharge and falsify it—the effect of which is to leave the account in full force, as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes. The showing an omission, for which credit ought to be given, is a surcharge; the proving an item to be wrongly inserted is a falsification. The *onus probandi* is always on the party having liberty to surcharge and falsify (*r*). And this liberty to surcharge and falsify includes an examination not only of errors of fact, but of errors of law. What shall constitute, in the sense of a court of equity, a stated or settled account, is in some measure dependent on the circumstances of each case. An acceptance of an account may be express, or it may be implied from circumstances. Acquiescence in stated accounts, even though for a long time, although it amounts to an admission or presumption of their correctness, does not of itself establish the fact of the account having been settled (*s*).

(2.) Laches, and acquiescence.

The court is generally unwilling to open a settled account, especially after a long time has elapsed, except in cases of apparent fraud. But in cases of settled accounts between trustee and *cestui que trust*, and other

(*r*) *Pitt v. Cholmondeley*, 2 Ves. Sr. 565.

(*s*) *Hunter v. Belcher*, 2 De G. J. & S. 194, 202; *Gething v. Keighley*, 9 Ch. Div. 547.



persons standing in confidential relations to one another, where *mala fides* is alleged, there is scarcely any length of time that will prevent the court from opening the account altogether (*t*), or at any rate giving liberty to surcharge and falsify.

And it should be remembered, that a broker is in a fiduciary relation to his client (*u*), although a banker is not in any such relation towards his customer (*v*). Also, *semble*, an assurance society is not in any fiduciary relation towards the person entitled to the policy moneys, but is rather in the position of a mere stakeholder (*w*).

Broker and  
banker,—  
difference  
between.

---

(*t*) *Matthews v. Wallwyn*, 4 Ves. 125; *Todd v. Wilson*, 9 Beav. 486; *Watson v. Rodwell*, L. R. 7 Ch. Div. 625; 11 Ch. Div. 150; and see pp. 168, 169, *supra*.

(*u*) *Ex parte Cooke*, *In re Strachan*, L. R. 4 Ch. Div. 123.

(*v*) *Foley v. Hill*, 1 Phill. 405.

(*w*) *Matthew v. Northern Assurance Co.*, 9 Ch. Div. 80. But see *In re Haycock's Policy*, 1 Ch. Div. 611; *Crossley v. City of Glasgow Life Assurance Co.*, 4 Ch. Div. 421.

## CHAPTER VIII.

## SET-OFF AND APPROPRIATION OF PAYMENTS.

I. Set-off. I. SET-OFF. "Natural equity says that cross demands should compensate each other, by deducting the less sum from the greater: and that the difference is the only sum which can be justly due" (a). But the common law refused to carry out this principle of justice, and held that where the mutual debts were unconnected, they should not be set-off, but the respective creditors should sue in independent actions for them. The natural sense of mankind was shocked at this, and accordingly the legislature interfered, firstly, in the case of bankrupts, and allowed a set-off at common law in that and a few other cases by the statutes of "Set-off" (b).

At law, no set-off in case of mutual unconnected debts.

As to connected accounts, balance recoverable both at law and in equity.

As to connected accounts of debit and credit, it is certain that both at law and in equity, and without any reference to the last-mentioned statutes, or the tribunal in which the cause is depending, the same general principle prevails, that the balance of the accounts only is recoverable; which is, therefore, a virtual adjustment and set-off between the parties (c).

Cases in which equity allowed, although law did not allow, set-off.

Even equity generally followed the law as to set-off, but with limitations and restrictions. If there was no connection between the demands, then the rule was as at law; but if there was a connection between the

---

(a) *Green v. Farmer*, 4 Burr. 2220.

(b) 4 Anne, c. 17, s. 11; 2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 4.

(c) *Dale v. Sollet*, 4 Burr. 2133.

demands, equity acted upon it, and allowed a set-off under particular circumstances (*d*).

In the first place, then, it would seem, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, were accustomed to grant relief in all cases, where there were mutual and independent debts, and there was a mutual credit between the parties, founded at the time upon the existence of some debts, due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, was to be understood a knowledge, on both sides, of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it (*e*). Thus, for example if A. should be indebted to B. in the sum of £10,000 in a bond, and B. should borrow of A. £2000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the £2000, as an ultimate set-off, *pro tanto*, against the debt of £10,000. Now, in such a case, a court of law could not set-off these independent debts against each other; but a court of equity would not hesitate to do so, upon the ground either of the presumed intention of the parties, or of what was called a natural equity (*f*). And now under the Judicature Acts, 1873-75, and orders and rules thereunder, especially Order xix., Rule 3, in extension of the C. L. P. Act, 1854 (*g*), such independent debts contracted upon such a ground of mutual credit may be set-off against each other.

In the next place, as to equitable debts, or a legal (*2*). In the

(*d*) *Rawson v. Samuel*, 1 Cr. & Ph. 161, 172, 173.

(*e*) *Ex parte Prescott*, 1 Atk. 230.

(*f*) *Lanesborough v. Jones*, 1 P. Wms. 326; *Jeffs v. Wood*, 2 P. Wms. 128.

(*g*) *Bullen and Leake*, p. 570.

case of mutual equitable debts, or a legal debt on one side, and equitable debt on the other, where there was mutual credit as to such debts.

debt on one side, and an equitable debt on the other, there was great reason to believe that, whenever there was a mutual credit between the parties touching such debts, a set-off was upon that ground alone maintainable in equity; although the mere existence of mutual debts, without such mutual credit, might not, even in a case of insolvency, have sustained it (*h*). But the mere existence of cross demands would not have been sufficient to justify a set-off in equity (*i*). Indeed, a set-off was ordinarily allowed in equity only when the party seeking the benefit of it could show some equitable ground for being protected against his adversary's demand—the mere existence of cross demands was not sufficient. *A fortiori* a court of equity would not interfere on the ground of an equitable set-off to prevent a party recovering a sum awarded to him for damages for breach of contract, merely because there was an unsettled account between him and the other party, in respect of dealings arising out of the same contract (*j*). But now there would be a set-off both at law and in equity in all these cases.

In cross demands which, if recoverable at law, would be a subject of set-off, equity relieves.

However, where there were cross demands between the parties of such a nature that, if both were recoverable at law, they would be the subject of a set-off, then if either of the demands was a matter of equitable jurisdiction, the set-off would be enforced in equity (*k*). As, for example, if a legal debt was due to the defendant by the plaintiff, and the plaintiff was the assignee of a legal debt due to a third person from the plaintiff, which had been duly assigned to himself, a court of equity would set-off the one against the other, if both debts could properly be the subject of set-off

(*h*) *James v. Kynnier*, 5 Ves. 110; *Piggott v. Williams*, 6 Mad. 95.

(*i*) *Rawson v. Samuel*, 1 Cr. & Ph. 161.

(*j*) St. 1436; *Rawson v. Samuel*, 1 Cr. & Ph. 161; *Best v. Hill*, L. R. 8 C. P. 10.

(*k*) *Clarke v. Cort*, 1 Cr. & Ph. 154.

at law (*l*). And now there would be no difficulty in setting off such cross demands either at law or in equity.

But a set-off always was, and still will be, prevented by some intervening equity. Thus, a shareholder in a limited company, who is also a creditor, will not, in the event of the company being wound up, be allowed to set-off his debt against calls made on him; but must first pay the amount of all calls due, and then take a dividend rateably with other creditors. In this case the equity of the general creditors intervenes to prevent the set-off; otherwise, in the event of a deficiency of assets, the creditor-shareholder would get an undue preference, and in effect receive 20s. in the pound on the amount of his debt (*m*). And there is no set-off of non-actionable claims against an actionable debt (*n*). But a solicitor's lien on costs appears to be no longer a bar to a set-off of costs against debt (*o*).

In winding up, debt not set-off against calls.

Other cases of no set-off.

In Bankruptcy, where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under the bankruptcy, . . . the sum due from one party shall be set-off against any sum due from the other party; and this rule extends to a case of liquidated damages (*p*). And, *semble*, it extends also to unliquidated damages (*q*).

Set-off under Bankruptcy Act 1869, 32 & 33 Vict., c. 71, s. 29.

In the next place, courts of equity following the law No set-off of

(*l*) St. 1436 a; *Williams v. Davies*, 2 Sim, 461.

(*m*) *Grisell's Case*, L. R. 1 Ch. 528; *Black & Co's Case*, L. R. 8 P. Ch. 254; but see *Brighton Arcade Company v. Dowling*, L. R. 3 C. P. 175.

(*n*) *Rawley v. Rawley*, 1 Q. B. Div. 460; and see *Hodgson v. Fox*, 9 Ch. Div. 673.

(*o*) *Pringle v. Gloag*, 10 Ch. Div. 676.

(*p*) *Booth v. Hutchinson*, L. R. 15 Eq. 30; and see Judicature Act, 1873, s. 25, § 1.

(*q*) Bankruptcy Act, 1869, s. 31; Judicature Acts, Order xix., 2, 3.

debts accruing in different rights. would not allow a set-off of a joint debt against a separate debt, or, conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they would not allow a set-off of debts accruing in different rights; and, therefore, where an executor and trustee of a legacy, who was also the residuary legatee, had become the creditor of the husband and administrator of the deceased legatee, he was not, in the absence of any special agreement, allowed to set-off his debt against the legacy, to which the husband, having survived his wife the legatee, was as such administrator entitled (*r*).

Except under special circumstances, as fraud. But special circumstances might occur creating an equity which would justify the interposition of the court, even where the cross demands existed in different rights. Thus, in *Ex parte Stephens* (*s*), bankers were directed to lay out money in certain annuities, in the name and to the use of S. They did not do so; but, representing that they had done so, made entries and accounted for the dividends accordingly. S. afterwards, relying on their representations, gave a joint and several promissory note, with her brother, to the bank, to secure the brother's private debt to them. The bankers afterwards failed, and their assignees in bankruptcy sued the brother alone. A petition was then presented by S. and her brother, praying that the petitioners might be at liberty to set-off what was due on the note against the debt due by the bankrupts to S., that she might prove for the residue, that the note might be delivered up, and the assignees might be restrained from suing upon it; and it was accordingly so decreed (*t*). And now under the Judicature Acts, 1873-75, especially Order xvii., Rules 1, 3, and 4, what was formerly

(*r*) *Freeman v. Lomas*, 9 Hare, 109; *Lambarde v. Older*, 17 Beav. 542; *Bailey v. Finch*, L. R. 7 Q. B. 34.

(*s*) 11 Ves. 24.

(*t*) *Vulliamy v. Noble*, 3 Mer. 593; *Ex parte Hanson*, 12 Ves. 346; 18 Ves. 232; *Cawdor v. Lewis*, 1 You. & Coll. Exch. C. 427, 433.

permitted in exceptional cases only, is now apparently made the rule, so that debts accrued in different rights may be now set-off, *semble*.

II. Appropriation of payments. Questions as to the appropriation, or, as it is termed in the Roman law, the imputation, of payments, arise in this way. Suppose a person owing another several debts makes a payment to him, the question then arises, to which of these debts shall such payment be appropriated or imputed,—a matter often of considerable importance, not only to the debtor and creditor, but sometimes also to third persons. For instance, suppose A. owes to B. two distinct sums of £100 and £100, and A. could set up the Statute of Limitations as a defence to an action for the earlier of the two debts, but not to an action brought for the other, it is clear that if A. paid £100 to B., and that payment could be imputed to the earlier debt, B. could still recover from him another £100; whereas if it were appropriated to the later debt, he would be without remedy as to the earlier. Again, suppose A. owes B. two sums of £500, for the first of which C. is a surety; if A. pays B. £500, and it is imputed to the first £500, C.'s liability will cease; if it be imputed to the other £500, C.'s liability will remain (*u*).

The first rule upon the subject of appropriation is,—that the debtor has the first right to appropriate any payments which he makes to whatever debt, due to his creditor, he may choose to apply it, provided the debtor exercise this option *at the time of making the payment* (*v*). And the intention of the person making the payment may not only be manifested by him in

II. Appropriation or imputation of payments.

(1.) Debtor has first right to appropriate payments to which debt he chooses at time of payment.

(*u*) *Clayton's Case*, 1 Mer. 572; Tudor's L. C. Merc. Law, 17.

(*v*) St. 459 c.; *Anon.* Cro. Eliz. 68.

express terms (*w*), but it may be inferred from his conduct at the time of payment, or from the nature of the transaction (*x*).

(2.) If debtor omit, the creditor has the next right of appropriation to what debts he chooses.

In the next place, where the debtor has himself made no special appropriation of any payment, then the creditor is at liberty to apply that payment to any one or more of the debts which the debtor owes him (*y*); and it seems that the creditor need not make an immediate appropriation of it, but may do so at any time, at least before action (*z*). This privilege of the creditor, however, must be taken with this limitation, that he has no right to apply a general payment to an item in the account which is in itself illegal and contrary to law (*a*).

However, where A. was indebted to B. on several accounts, and a payment had been made, as for the first instalment of a composition on the several debts; but the arrangement subsequently broke down, owing to the non-payment of the other instalments; it was held, that it was not open to either party subsequently to appropriate the payment to any specific debt; but that, from the nature of the transaction, it must be deemed to have been paid in respect of all the debts rateably (*b*).

Statute-barred debts, appropriation, effect of:

Where there are two debts, one of them barred by the Statute of Limitations, and a payment is made by the debtor without appropriating the payment, the

(*w*) *Ex parte Imbert*, 1 De G. & Jo. 152.

(*x*) *Young v. English*, 7 Beav. 10; *Att.-Gen. of Jamaica v. Mander-son*, 6 Moo. P. C. C. 239, 255; *Buchanan v. Kerby*, 5 Gr. 332.

(*y*) *Lysaght v. Walker*, 5 Bligh, N. S. 1, 28; *Re Brown*, 2 Gr. 111, 590.

(*z*) *Philpott v. Jones*, 4 Nev. & Man. 16; 2 Ad. & Ell. 44; *Simson v. Ingham*, 2 B. & C. 65.

(*a*) *Wright v. Laing*, 3 B. & C. 165; *Ribbans v. Crickett*, 1 B. & P. 264.

(*b*) *Thompson v. Hudson*, L. R. 6 Ch. 320.



creditor may appropriate it towards satisfaction of the debt already barred; but such an appropriation will have no operation to revive a debt already barred (c). And where there are several debts, some of which are barred, if a payment is made on account of principal or interest generally, the effect of such payment will be to take out of the operation of the statute any debt which is not barred at the time of payment, but it will not revive a debt which is then barred; and the inference will be that the payment is to be attributed to those not barred (d).

(a.) Appropriation will not revive a debt already barred.  
(b.) A general payment by debtor takes a debt not already barred out of the statute, but does not revive a barred debt.

If neither debtor nor creditor has made any appropriation, then the law will appropriate the payment, it seems, to the earlier, and not, as the Roman law does, to the more burdensome debt (e).

(3.) If neither debtor nor creditor makes the appropriation, the law makes it.

This rule receives its most frequent application in cases of running accounts between parties, where there are various items of debts on one side, and various items of credit on the other side, occurring at different times, as in a banking account. In *Clayton's Case* (f), on the death of D., a partner in a banking firm, there was a balance of £1713 in favour of C., who had a running account with the firm. After the death of D., the surviving partners became bankrupt; but, before their bankruptcy, C. had drawn out sums to a larger amount than £1713, and had paid in sums still more considerable. It was held that the sums drawn out by C. after the death of D. must be appropriated to the payment of the balance of £1713 then due, and that consequently the estate of D. was discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm were

*Clayton's Case*,—Current accounts, law of appropriation in cases of.

(c) *Mills v. Fowkes*, 5 Bing. N. C. 455.

(d) *Nash v. Hodgson*, 6 De G. M. & G. 474.

(e) *Mills v. Fowkes*, 5 Bing. N. C. 455. See Pothier Oblig. by Evans, 528-535, 561-572.

(f) 1 Mer. 585.

alone liable. In such a case, the sums paid to the creditor are deemed to be paid upon the general blended account, and go to extinguish *pro tanto* the balance of the old firm, in the order of the earliest items thereof. "In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. *Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side.* The appropriation is made by the very act of setting the two items against each other. *Upon that principle all accounts current are settled, and particularly cash accounts.* When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made. You are not to take the account backwards, and strike the balance at the head, instead of at the foot of it. A man's banker breaks owing him on the whole account a balance of £1000. It would surprise one to hear the customer say, 'I have been fortunate enough to draw out all that I have paid in during the last four years; but there is £1000 which I paid in five years ago, that I hold myself never to have drawn out, and therefore if I can find anybody who was answerable for the debts of the banking house such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week' " (g).

The account is not to be taken backwards, and the balance struck at the head instead of the foot.

---

(g) Judgments in *Clayton's Case*, 1 Mer. 608, 609; *Palmer's Case*, 1 Mer. 623, 624; *Sleech's Case*, 1 Mer. 539. And see (for the law as to the appropriation of securities when there is a double bankruptcy), *Ex parte Waring*, 19 Ves. 345; *Ex parte Gomez, In re Yglesias*, L. R. 10. Ch. App. 639; and distinguish *Vaughan v. Halliday*, L. R. 9 Ch. App. 561; *Ex parte Kelly & Co., In re Smith, Fleming, & Co.*, 11 Ch. Div. 306.

## CHAPTER IX.

## SPECIFIC PERFORMANCE.

By the common law every executory contract to sell or transfer a thing is treated as a merely personal contract, and, if left unperformed by the party, no redress can be had excepting in damages. The common law thus allows the party the election either to pay damages or to perform the contract at his sole pleasure. But courts of equity have deemed such a course wholly inadequate for the purposes of justice, and they have not hesitated to interpose and require from the conscience of the offending party a strict performance of what he cannot, without manifest fraud or wrong, refuse.

Breach of contract at common law a question of damages.

In equity, contract must be exactly performed.

The ground of the jurisdiction in equity being the inadequacy of the remedy at law, it follows as a general principle, that where damages at law will give a party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere (a), and such appears to be still the law, notwithstanding the Judicature Acts, 1873-75.

Inadequacy of remedy at law, ground of equity jurisdiction.

There are, however, certain cases where equity refuses to interfere to compel specific performance, without taking into consideration the question whether adequate relief can be obtained at law or not.

Cases in which equity will not decree specific performance of an agreement or contract,—

The court will not decree specific performance of an

(1.) An illegal or immoral contract.

---

(a) *Harnett v. Yeilding*, 2 Sch. & Lef. 553.

agreement to do an action immoral or contrary to the law. As expressed by Sir William Grant, "You cannot stir a step but through the illegal agreement, and it is impossible for the court to enforce it" (b).

(2.) An agreement without consideration.

So again, a court of equity will not enforce specific performance of an agreement without consideration. In *Jefferys v. Jefferys* (c), a father, by voluntary settlement, having conveyed certain freeholds, and covenanted to surrender certain copyholds to trustees in trust for his daughters, afterwards devised the same freehold and copyhold estates to his widow. A suit was instituted by the daughters against the widow to have the trusts of the settlement carried out. The Lord Chancellor said, "The title of the plaintiffs to the FREEHOLDS is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the COPYHOLDS, I have no doubt that *the court will not execute a voluntary contract.*"

(3.) A contract which the court cannot enforce.  
(a.) Where personal skill is required.

The incapacity of a court to compel the complete execution of a contract in certain cases, limits its jurisdiction to compel specific performance. This principle is most frequently illustrated in cases of agreements to do acts involving personal skill, knowledge, or inclination. Thus, in *Lumley v. Wagner* (d), a lady agreed in writing with a theatrical manager to sing at his theatre for a definite period. By a clause subsequently agreed to by her, she engaged not to use her talents at any other theatre or concert-room, without the written authorisation of the manager. The lady engaged with the manager of a rival theatre within the defined period. It was held, that though

(b) *Thomson v. Thomson*, 7 Ves. 470; *Ewing v. Osbaldiston*, 2 My. & Cr. 53.

(c) Cr. & Ph. 141.

(d) 5 De G. & Sm. 485; 1 De G. M. & G. 604.

the court would restrain the lady from singing at any other theatre, it could not compel her to sing at the theatre of the plaintiff according to her agreement (e). It is on the same principle that the court refuses specific performance of an agreement for the sale of the good-will of a business unconnected with the business premises, by reason of the uncertainty of the subject-matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it (f). Again, it seems to be now settled that the court will not interfere in cases of contracts to build or repair. "There is no case of a specific performance decreed of an agreement to build a house, because if A. will not do it, B. may. A specific performance is only decreed where the party wants the thing *in specie*, and cannot have it any other way" (g). In the case of building contracts the plaintiff has an adequate, perhaps a better, remedy in damages (h). Another reason for the refusal of courts of equity to decree specific performance of agreements to build is, that such contracts are for the most part too uncertain to enable the court to carry them out (i). It seems, however, that where such an agreement is clear and definite in its nature, the court might without much difficulty entertain a suit for its performance (j). So again, the court will not enforce a contract which is in its nature revocable, for its interference in such a case would be idle, inasmuch as what it had done might be instantly undone by either of the parties.

(b.) Contract to transfer good-will of a business without the premises.

(c.) Contracts to build or repair not enforced, because they are generally too uncertain.

(d.) Revocable contract.

(e) *Martin v. Nutkin*, 2 P. Wms. 266; *Dietrichsen v. Cabburn*, 2 Phil. 52.

(f) *Baxter v. Conolly*, 1 J. & W. 576; *Darbey v. Whittaker*, 4 Drew. 134, 139, 140.

(g) *Errington v. Aynesly*, 2 Bro. C. C. 343.

(h) *South Wales Railway Co. v. Wythes*, 1 K. & J. 186; 5 De G. M. & G. 880.

(i) *Mosely v. Virgin*, 3 Ves. 184.

(j) *Mosely v. Virgin*, 3 Ves. 184; *Baumann v. James*, L. R. 3 Ch. 508; *Lucas v. Comerford*, 1 Ves. 235.

It is on this principle that the court generally refuses to interfere in cases of agreements to enter into partnership, which do not specify the duration of the partnership,—that relation, unless otherwise provided, being dissoluble at the will of either party (*k*).

(4.) Contract  
wanting in  
mutuality.

Statute of  
Frauds no ex-  
ception to this  
rule, excepting  
in appearance.

Where the specific performance of a contract will be decreed upon the application of one party, courts of equity will maintain the like suit at the instance of the other party, although the relief sought by him is merely in the nature of a compensation in damages or value; for in all such cases the court acts upon the ground that the remedy, if it exists at all, ought to be mutual and reciprocal, as well for the vendor as for the purchaser (*l*). It follows, therefore, that an infant cannot sustain a bill for specific performance, for a court of equity will not compel a specific performance as against him (*m*). An apparent but no real exception is that arising under the Statute of Frauds, where a plaintiff may obtain a decree for specific performance of a contract signed by the defendant although not signed by the plaintiff, who if sued on his part would not have been liable. But such “cases are supported, first because the Statute of Frauds (*n*) only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff by the act of filing the bill has made the remedy mutual. Neither of these reasons applies to the case of an infant. The act of filing the bill by his ‘next friend’ cannot bind him” (*n*).

Division of

Having premised these general observations, it is

---

(*k*) *Hercy v. Birch*, 9 Ves. 357; *Sturge v. Mid. Rail. Co.*, 6 W. R. 233.

(*l*) *Adderley v. Dixon*, 1 S. & S. 607.

(*m*) *Flight v. Bolland*, 4 Russ. 301.

(*n*) 29 Car. II. c. 3.

(*o*) *Flight v. Bolland*, 4 Russ. 301.

proposed to treat the subject under two heads, with regard to—

subject, according as the property is realty or is personalty.

### I. Contracts respecting chattels personal.

### II. Contracts respecting land.

In making this distinction, however, it is necessary to remember that courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal value, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as with the damages he may purchase the same quantity of the like stock or goods (*p*).

No essential difference between realty and personalty. Contracts as to realty enforced, because remedy at law is inadequate.

*Secus*—contracts concerning personalty, because the legal remedy as a rule is adequate.

### I. Contracts respecting personal chattels.

I. Contracts respecting personal chattels. Not generally enforced.

The general rule now is, not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature (*q*). But this rule is qualified and subject to certain exceptions; or rather the rule is limited to cases where a compensa-

(*p*) *Adderley v. Dixon*, 1 S. & S. 610.

(*q*) *Pooley v. Budd*, 14 Beav. 34.

tion in damages furnishes a complete and satisfactory remedy.

Exceptions to  
general rule—  
(1.) Contract  
respecting  
shares in a  
railway com-  
pany.

Thus, in *Duncuft v. Albrecht* (r), the Vice-Chancellor, in decreeing specific performance of an agreement for the sale of a certain number of shares in a railway company, said—"Now, I agree that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of three per cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market" (s).

In *Buxton v. Lister* (t), Lord Hardwicke puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him, by reason of its vicinity, and also the case of an owner of land covered with timber, contracting to sell his timber, in order to clear his land, and assumes that as, in both these cases, damages would not, by reason of the special circumstances, be a complete remedy, equity would decree a specific performance (u).

(2.) Sale of  
assigned debts  
under a bank-  
ruptcy.

In *Adderley v. Dixon* (v), the plaintiffs having purchased and taken assignments of certain debts which had been proved under two commissions of bank-

---

(r) 12 Sim. 199.

(s) *Doloret v. Rothschild*, 1 Sim. & Stu. 598; *Shaw v. Fisher*, 2 De G. & Sm. 11; *Odessa Tramways v. Mendel*, 8 Ch. Div. 235.

(t) 3 Atk. 385.

(u) *Adderley v. Dixon*, 1 Sim. & Stu. 607.

(v) 1 Sim. & Stu. 607.



ruptcy, agreed to sell them to the defendant for 2s. 6d. in the pound, a specific performance of the agreement at the suit of the vendor was enforced, and the learned Vice-Chancellor said—"The present case, being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price. It is true, that the present bill is not filed by the purchaser, but by the vendor, who seeks not the uncertain dividends but the certain sum to be paid for them. It has, however, been settled by repeated decisions that the remedy in equity must be mutual, and that where a bill will lie for the purchaser it will also lie for the vendor" (w).

Courts of equity will compel the specific delivery (3.) Contracts as to rare and beautiful articles. "of articles of unusual beauty, rarity, and distinction, so that damages would not be an adequate compensation for non-performance" (x). In *Dowling v. Betjemann* (y), it was decided that the court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of the agreement and the frame of the pleadings, the plaintiff, seeking restitution of a picture, had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a court of equity to interfere.

It has been repeatedly decided, that it is within the (4.) Delivery

---

(w) *Wright v. Bell*, 5 Price, 325; *Kenney v. Wexham*, 6 Mad. 355; *Cogent v. Gibson*, 33 Beav. 557.

(x) *Falcke v. Gray*, 4 Drew. 658.

(y) 2 J. & H. 544.

up of heir-  
looms and  
other chattels  
of peculiar  
value.

jurisdiction of a court of equity to compel the specific delivery up of heirlooms or chattels of peculiar value to the owner, and on the same grounds as in cases of agreement, that the specific thing is the object, and damages will not afford an adequate compensation (2). "Thus, the *Pusey Horn*, the *patera* of the Duke of Somerset, were things of such a character as a jury might (possibly) estimate by their weight; and this would obviously be a very inadequate and unsatisfactory measure of damages. In all cases, therefore, where the object of the suit is not open to compensation by damages, it would be strange if the law of this country did not afford any remedy; and great would be the injustice, if an individual cannot have his property without being liable to the estimate of people who cannot value it as he does" (a).

(5.) Specific  
performance  
where a fidu-  
ciary relation  
exists.

The cases which have been referred to are not the only class of cases in which the court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be that of an agent or a trustee or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of the power, and will compel a specific delivery up of the articles (b).

Common law  
powers as to  
specific de-

The Courts of Common Law have now, under the Common Law Procedure Act of 1854 (c), after judg-

(2) *Somerset v. Cookson*, 1 L. C. 891; *Pusey v. Pusey*, 1 Vern. 273.

(a) *Fells v. Read*, 3 Ves. 70; *Macclesfield v. Davis*, 3 V. & B. 16; *Reece v. Trye*, 1 De G. & Sm. 273; *Beresford v. Driver*, 14 Beav. 387; 16 Beav. 134.

(b) *Wood v. Rowcliffe*, 3 Hare, 304; 2 Ph. 383; *Pollard v. Clayton*, 1 K. & J. 462; *Edwards v. Clay*, 28 Beav. 145.

(c) 17 & 18 Vict. c. 125, s. 78.

ment in an action of detinue, the same jurisdiction to compel the return of a chattel as the Court of Chancery, but the latter court may enforce its decrees by attachment, whilst the Courts of Common Law can only enforce restitution by distringas (*d*). Under the Judicature Acts, 1873-75, the power of Courts of Law is now co-extensive in this respect with that of Courts of Equity. And under the 100th section of the Companies Act, 1862, relief that is substantially specific performance may be obtained on summons, without action, when the company is in liquidation (*e*).

livery, under 17 & 18 Vict., c. 125; and now under Judicature Acts, 1873-75.

## II. Contracts respecting land.

## II. Contracts respecting land.

It has been already suggested that courts of equity are in the habit of interposing to grant relief in cases of contracts respecting real property, to a far greater extent than in cases of contracts respecting personal property; not, indeed, upon the ground of any distinction founded upon the mere nature of the property, as real or as personal, but at the same time not wholly excluding the consideration of such a distinction. In regard to contracts respecting personal property, if the contract is not specifically performed, the purchaser may in general provide himself with other goods of a like description and quality, with the damages given him at law, and thus completely obtain his object. But in contracts respecting a specific messuage or parcel of land, the same considerations do not in general apply. The locality, character, vicinage, soil, easements, or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniencies or accommodations; and, therefore, a compensation in damages would not

Generally enforced, because damages at law no remedy.

(*d*) Day's Com. Law Proc. Acts, 249.

(*e*) *In re Oakwell Collieries Co.*, W. N. 1879, p. 65.

be adequate relief (*f*). It would not attain the object desired, and it would generally frustrate the plans of the purchaser. And hence it is that the jurisdiction of courts of equity to decree specific performance is, in cases of contracts respecting lands, universally maintained, whereas in cases respecting chattels it is limited to special circumstances. And the jurisdiction extends even to lands that are out of the jurisdiction, if the contract's parties are within it (*g*).

Cases in which even the Statute of Frauds is broken in upon.  
(*a.*) If unconscientious to rely on it,—generally.

The Statute of Frauds says, that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it; and yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it generally against conscience in the other party to insist on the want of writing so signed as a bar to the relief (*h*). It is proposed to inquire, under what other more particular circumstances courts of equity hold that, notwithstanding the express language of the statute, a case may be taken out of its operation.

(*b.*) Where the agreement is confessed by the defendant's answer.

In the first place, then, courts of equity will enforce a specific performance of a contract within the statute, not in writing, where it is fully set forth in the bill, and is confessed by the answer of the defendant (*i*). The reason given for this decision is, that the statute is designed to guard against fraud and perjury; and in such a case there can be no danger of that sort. The case, then, is entirely taken out of the mischief intended to be guarded against by the statute. Perhaps another reason might fairly be added, and that is

---

(*f*) *Adderley v. Dixon*, 1 Sim. & Stu. 607.

(*g*) *In re Longendale Cotton Spinning Co.*, 8 Ch. Div. 150; *Penn v. Lord Baltimore*, 2 L. C. 837.

(*h*) *Bond v. Hopkins*, 1 S. & L. 433.

(*i*) *Att.-Gen. v. Sitwell*, 1 You. & Col. Exch. Ca. 559; *Gunter v. Halsey*, Amb. 586.

that the agreement, although originally by parol, is now in part evidenced by writing under the signature of the party, which is a complete compliance with the terms of the statute. If such an agreement were originally by parol, but were afterwards reduced into writing by the parties, no one would doubt its obligatory force. Indeed, if the defendant does not insist on the defence, he may fairly be deemed to waive it; and the rule is, *Quisque renuntiare potest juri pro se introducto* (j). It has been settled, however, that although the defendant by his answer confesses the parol agreement, he may insist by way of defence upon the protection of the statute, and such a defence is good (k). Unless the defendant, notwithstanding, insists upon the defence.

Secondly, courts of equity will enforce a specific performance of a contract within the statute where the parol agreement has been partly carried into execution by the party praying relief (l). The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be able to practise a fraud upon the other; and it could never be the intention of the statute to enable any party to commit a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted instead of being obstructed by a jurisdiction for discovery and relief. And where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice (m). (c.) Where the contract is partly performed by the party seeking aid.

---

(j) 1 Fonbl. Eq. B. 1. ch. 3, s. 8, note d.

(k) *Cooth v. Jackson*, 9 Ves. 37; *Blagden v. Bradbear*, 12 Ves. 466, 471; *Skinner v. M'Douall*, 2 De G. & Sm. 265.

(l) *Caton v. Caton*, L. R. 1 Ch. 137.

(m) *Nicol v. Tackaberry*, 10 Gr. 109; *Hussey v. Horn Payne*, 4 App. Ca. 311.

Part-performance,—what is?

In order to withdraw a contract on the ground of part-performance from the operation of the statute, several circumstances must concur.

(1.) Acts of part-performance must be referable alone to the agreement alleged.

(1.) The acts of part-performance must be such as are not only referable to an agreement such as that alleged, but such as are referable to no other title. For if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part-performance of the agreement (*n*).

(2.) Introductory or ancillary acts are not acts of part-performance.

(2.) Also, acts merely introductory or ancillary to an agreement are not considered as part-performance thereof, although they should be attended with expense. Therefore, delivering an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute (*o*). They are all preliminary proceedings, and for which damages for loss of time and labour would be an adequate compensation; and besides, they are of an equivocal character, and capable of a double interpretation; whereas acts to be deemed a part-performance should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part-execution.

Mere possession of the land not an act of part-performance, if referable otherwise than to the agreement

Consequently, the mere possession of the land contracted for will not be deemed a part-performance if it be wholly independent of the contract; therefore, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set

(*n*) *Gunter v. Halsey*, Amb. 586; *Lacon v. Mertins*, 3 Atk. 4.

(*o*) *Hawkins v. Holmes*, 1 P. Wms. 770; *Pembroke v. Thorpe*, 3 Swaust. 437; *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 566.

up his possession as an act of part-performance of the agreement, it was held not to be such, because it was referable otherwise than to the agreement, *i.e.*, to his character as tenant (*p*). So again, where a tenant from year to year continues in possession, and lays out such moneys on the farm as are usual in the ordinary course of husbandry, this is no part-performance of an agreement for a lease (*q*). But if the possession be delivered, and delivered and obtained *solely under the contract*; or if, in case of tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, *referable solely and exclusively to the contract*, there the possession may take the case out of the statute. Especially will it be held to do so where the party let into possession has expended money in building and repairs or other improvements; for under such circumstances, if the parol contract were to be deemed a nullity, the expenditure would not only operate to his prejudice, but be the direct result of the fraud practised upon him; and besides, he would be liable to be treated as a trespasser (*r*).

(3.) The agreement which the acts of part-performance allow to be set up by parol evidence must be of such a nature that the court would have had jurisdiction in respect of it, in case it had been in writing. Where the court has jurisdiction in the original subject-matter, viz., the contract, the want of writing will not deprive the court of it where there is part-performance. But the want of writing cannot itself be made the ground of jurisdiction; for then all parol contracts which the Statute of Frauds requires to be in writing might be enforced in equity when there was a part-

(3.) The agreement must originally have been cognisable in a court of equity, independently of the acts of part-performance.

(*p*) *Wills v. Stradling*, 3 Ves. 378; *Morphett v. Jones*, 1 Swanst. 181.

(*q*) *Brennan v. Bolton*, 2 Dr. & War. 349.

(*r*) *Lester v. Foxcroft*, 1 L. C. 828; *Aylesford's Case*, 2 Str. 783; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Gregory v. Mighell*, 18 Ves. 328; *Pain v. Coombs*, 1 De G. & Jo. 34, 46.

performance (s). And where the possession taken is not under a contract, but adverse, the circumstance that there is no legal remedy does not suffice to give the court jurisdiction (t).

(4.) The acts done must not be capable of being undone, therefore payment of part or whole of purchase-money is not an act of part-performance, because repayment will put the parties into the same position as before.

(4.) Payment of a part or even of the whole of the purchase-money is not an act of part-performance so as to take a contract out of the Statute of Frauds (u); "for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Foxcroft v. Lester*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent." Another reason alleged for the rule that "part-payment does not take the case out of the statute is, that the statute has said (v), that in another case, viz., with respect to goods, it shall operate as a part-performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands." (w).

29 Car. II., c. 3, sec. 17, provides for part-payment as to goods.

*Expressio unius, exclusio alterius.*

(5.) Marriage is not in itself part-performance, although not usually capable of being undone; but acts of part-performance independent.

(5.) Marriage alone is not a part-performance of a parol agreement in relation to it; for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage, in order to be binding, must be in writing (x). But a parol contract may be taken out of the statute by acts of

(s) Fry on Spec. Performance, 179; *Kirk v. Bromley Union*, 2 Phil. 940.

(t) *East India Co. v. Veerasawmy Moodelly*, 7 Moo. P. C. C. 482.

(u) *Hughes v. Morris*, 2 De G. M. & G. 349.

(v) Sec. 17.

(w) *Clinan v. Cooke*, 1 S. & L. 41; *Seagood v. Meale*, Prec. in Ch.

560

(x) *Warden v. Jones*, 2 De G. & Jo 76; *Caton v. Caton*, 1 L. R. Ch. 137; L. R. 2 Ho. of Lds. 127.



part-performance independently of the marriage. Thus, in *Surcombe v. Pinniger* (y), a father, previous to the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband also expended money upon the property. It was held that there had been sufficient part-performance of the parol contract to take the case out of the Statute of Frauds. "In this case," said Turner, L. J., "there is a part-performance by the delivering up of possession to the husband,—a fact which has always been held to change the situations and rights of the parties,—and there has been considerable expenditure by him on the property. There is, therefore, here what was wanting in *Lassence v. Tierney* (z)—acts of part-performance besides the marriage" (a).

ently of the marriage are a part-performance.

It would seem, also, that if there be "a written agreement after marriage, in pursuance of a parol agreement before marriage, this takes the case out of the statute" (b); and the reason is this, that the object of the 4th sec. of the Statute of Frauds was not to alter principles of law, but modes of evidence. Its object was to prevent the mischief arising from resorting to oral evidence to prove the existence of the terms of an alleged verbal agreement in certain specified cases, and, amongst the rest, an agreement made in consideration of marriage. It is obvious that there can be no ground to apprehend any such mischief

A post-nuptial written agreement in pursuance of an ante-nuptial parol agreement enforced.

(y) 3 De G. M. & G. 571; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; 5 Ch. Div. 887.

(z) 1 Mac. & G. 551.

(a) *Warden v. Jones*, 2 De G. & Jo. 84.

(b) Turner, L. J., in *Surcombe v. Pinniger*, 3 De G. M. & G. 571; *Dundas v. Dutens*, 1 Ves. 196; *Barkworth v. Young*, 26 L. J. Ch. 157; *Peach on Marr. Sett.* 81; but see Lord Cranworth's remarks in *Warden v. Jones*, 2 De G. & Jo. 85; also, *Trowell v. Shenton*, L. R. 8 Ch. Div. 318.

where you have a writing signed after marriage by the party to be charged, and referring clearly to the terms of an ante-nuptial agreement. It is therefore sufficient if there be a memorandum clearly containing the terms of the agreement before the action or suit arises (c).

A representation for the purpose of influencing another, which has that effect, will be enforced. Where on marriage a third party makes a representation, on the faith of which marriage takes place, he is bound to make it good.

And it may be further usefully mentioned here, with regard not only to parol marriage contracts, but to other parol contracts generally, that it is a very old head of equity, that "a representation made by one party, although by parol, for the purpose of influencing the conduct of the other party, and acted on by him, will be sufficient, although never subsequently evidenced by writing, to entitle him to the assistance of this court, for the purpose of realising such representation" (d); and it is a leading principle, repeatedly adopted in equity, that where, upon the marriage of two persons, a third party makes a representation upon the faith of which the marriage takes place, he shall be bound to make his representation good (e). It was upon this principle that an injunction was granted to restrain the enforcement of a demand, the party seeking to enforce it having, while a marriage treaty was pending, falsely represented to the father of the lady that there was no such demand existing. "If," said Lord Thurlow, "any man, upon a treaty for any contract, will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of the bargain, it is a fraud—it misleads the parties contracting on the subject of the contract. . . . The principle upon which all the cases upon this

(c) *Bailey v. Sweeting*, 30 L. J. C. P. 150; *Smith v. Hudson*, 6 N. R. 106.

(d) *Hammersley v. De Biel*, 12 Cl. & Fin. 62, 78.

(e) *Bold v. Hutchinson*, 20 Beav. 256; 5 De G. M. & G. 558; *Wulford v. Gray*, 13 W. R. 335; Affd. Ib. 761; *Goldicutt v. Townsend*, 28 Beav. 445; *Prole v. Soady*, 2 Giff. 1; and especially *Barkworth v. Young*, 26 L. J. Ch. 157.

subject have been decided is, that faith in such contracts is so essential to the happiness both of the parents and of the children, that whoever treats them fraudulently on such an occasion shall not only not gain, but shall even lose by it" (*f*).

But in these cases it is necessary that the plaintiff should base his action upon the ground of misrepresentation; for otherwise, if he bases it upon the ground of contract, he must make out a written contract or else sufficient part-performance. Thus, in *Caton v. Caton* (*g*), previously to marriage, the intended husband and wife agreed in writing (but which writing was never signed by the husband), that the husband should have the wife's property for his life, paying her £80 a year pin-money, and that she should have it after his death; and they gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement, the husband promising, as the wife alleged, that he would make a will giving her all his property. The husband had previously to the marriage prepared a will, and immediately after the marriage the husband and wife went into the vestry, and he there executed the will. After his death, a subsequent and different will was found. It was held by the Lord Chancellor and the House of Lords (reversing the decision of Stuart, V.-C.) that the wife was not entitled to specific performance of the agreement by the husband to leave her his property by will.

And now to resume the cases in which the Statute of Frauds will on various grounds be broken in upon—  
A contract regarding lands will be taken out of the operation of the statute, where the agreement is in—

Promise by husband to leave property by will not enforced,—where marriage is the consideration, and the promise is not in writing signed.

(*d.*) Where agreement concerning land is not put into writing by fraud

(*f*) *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Montefiori v. Montefiori*, 1 Wm. Bl. 363.

(*g*) L. R. 1 Ch. 137; L. R. 2 Ho. of Lds. 127.

of one of the parties.

tended to be put into writing according to the statute, but that is prevented from being done by the fraud of one of the parties. In such a case courts of equity have said that the agreement shall be specifically executed, for otherwise the statute, designed to suppress fraud, would be the greatest protection to it. Thus, if an agreement in writing should be drawn up, and another should be fraudulently and secretly brought in, and executed in lieu of the former, in this and the like cases equity will relieve. So if a man should treat for a loan of money on mortgage, and the conveyance is to be by an absolute deed of the mortgagor and a defeasance by the mortgagee, and, after the absolute deed is executed, the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance (*h*).

Representation of a mere intention, or a promise upon honour, not enforced.

Also, where the representation is not of an existing fact, but of a mere intention, or where a promisor will not bind himself by a contract, but gives the other party to understand that he must rely upon his honour for the fulfilment of his promise, in these cases, of course, the court will not enforce the performance of the representation or promise (*i*).

*Grounds of defence to a suit for specific performance.*

It is now proposed to consider the principal defences that may be set up to a suit for specific performance, independently of the Statute of Frauds.

(1.) Misrepresentation by plaintiff having reference to the contract.

A misrepresentation, having relation to the contract, made by one of the parties to the other, is a ground for refusing the interference of the court at the instance of the party who has made the misrepresentation, and may, in certain cases, be a ground for its active inter-

(*h*) *Maxwell v. Montacute*, Prec. Ch. 526; *Joyes v. Statham*, 3 Atk. 389; *Lincoln v. Wright*, 4 De G. & Jo. 16.

(*i*) *Maunsell v. White*, 1 Jo. & L. 539; 4 H. L. Cas. 1039; *Jorden v. Money*, 15 Beav. 372; 2 De G. M. & G. 318; 5 Ho. of Lds. Cas. 185.

ference in setting aside the contract, at the instance of the party deceived (*j*).

Mistake is also a ground of defence. The principle upon which courts of equity proceed in those cases where mistake is the ground of defence is this—that there must be an agreement binding at law; but that is not enough to entitle the plaintiff to more than his legal remedy,—the contract must be more than merely legal. It must not be hard or unconscionable; it must be free from fraud, from surprise, and from mistake; for where there is a mistake, there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire* (*k*).

(2.) Mistake rendering specific performance a hardship.

The settled rule of the court is to admit parol evidence, not merely for the purpose of proving a mistake by way not only of defence to a suit for specific performance, but for the purpose of correcting the mistake. This admission of such evidence is not a breach of the Statute of Frauds; because it should be remembered that the statute says, “No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement;” but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, “That is not the agreement meant to have been signed.” Such a case is left as it was before the statute: it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind (*l*).

Parol evidence of mistake is admitted notwithstanding the statute.

The statute does not say a written agreement shall bind, but that an unwritten agreement shall not bind.

(*j*) *Edwards v. M'Leay*, Coop. 308; *Baskcomb v. Beckwith*, L. S. S. Eq. 100; *Talbot v. Hamilton*, 4 Gr. 200; Fry on Spec. Perf. 191.

(*k*) Fry on Spec. Perf. 212. And see *Jones v. Clifford*, L. R. 3 Ch. Div. 779.

(*l*) *Clinan v. Cooke*, 1 Sch. & Lef. 39.

(3.) Error of defendant, although attributable to defendant's own negligence.

It follows from what has been stated, that where the defendant has been led into any error or mistake, the plaintiff cannot enforce the contract. Thus, in one case (*m*), a professional man was relieved at his own suit from an error in a deed of his own drawing. On the same principle, in *Malins v. Freeman* (*n*), where an estate was purchased at an auction, under a mistake as to the lot put up for sale, and the mistake arose wholly through the carelessness of the defendant, it was held that specific performance would not be enforced. The Master of the Rolls said—"The defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it. Certainly, if the defendant did fall into any mistake, it cannot be ascribed to the conduct of the plaintiff. The plaintiff and his agents in no respect contributed to it, and if the defendant, by his carelessness, has caused any injury or loss to the plaintiff, he is accountable for it.

"But the defendant may be answerable for damages at law, without being liable to a specific performance in this court. In cases of specific performance, the court exercises a discretion, and knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not, in all cases, decree a specific performance; as in cases of intoxication, although the party may not have been drawn in to drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the court will relieve, for the court is not here called upon to relieve the defendant from his legal liability, but

(*m*) *Ball v. Storie*, 1 S. & S. 210.

(*n*) 2 Keen, 25, 34; and distinguish *Jefferys v. Fairs*, L. R. 4 Ch. Div. 448.

whether, if the mistake be proved, the court will enforce a specific performance, or leave the defendant to his legal liability. And I think that if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed. . . . I am of opinion, that the defendant never did intend to bid for this estate. He was hurried and inconsiderate, and when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that, by his conduct, he occasioned some loss to the plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law" (o).

Contract not enforced where defendant did not intend to purchase or to sell.

We may now proceed to consider the effect of a mistake, or parol variation, set up by the defendant as a ground for refusing the specific performance of a written agreement alleged by the plaintiff (p).

Effect of mistake, where a parol variation is set up as a defence.

(a.) Where the parol variation set up by the defendant shows that, after the parties to the contract had mutually agreed with each other, an error occurred *in the reduction of the agreement into writing*, and it appears that the written agreement, varied according to the defendant's contention, represents the true contract between the parties, the court will, it seems, where there has been no fraud, enforce specific performance of the contract so varied. Thus, where a bill was brought for the specific performance of an agreement to grant a lease at a rent of £9 per annum, and the defendant insisted that it ought to have been a term of the agreement that the plaintiff should pay all taxes,

(a.) Where the error arose in the reduction of the agreement into writing, specific performance decreed with parol variation set up by the defendant.

(o) *Manser v. Back*, 6 Hare, 443; *Alvanley v. Kinnaird*, 2 Mac. & G. 7; *Baxendale v. Senle*, 19 Beav. 601; *Wood v. Scarth*, 2 K. & J. 33.

(p) See generally Fry on Spec. Perf. 216-236.

Lord Hardwicke granted specific performance, and directed that the terms of the verbal agreement should be carried out by the covenants to be inserted in the lease (q).

Plaintiff cannot obtain specific performance with parol variation of written agreement.

And the distinction is now apparently well established between the case of a plaintiff seeking, and a defendant resisting, specific performance. The rule is, that though a defendant, resisting specific performance, may go into parol evidence to show that, by fraud, accident, or mistake, the written agreement does not express the real terms, a plaintiff, with the exception hereafter noted, cannot do so for the purpose of obtaining specific performance with a variance.

Exception—unless the parol variation be in favour of the defendant.

Where, however, a plaintiff alleges a parol variation *in favour of the defendant*, and offers to perform the agreement with the variation, the court will enforce specific performance, though the defendant plead the statute. Thus, where the defendant agreed in writing to grant the plaintiff a lease at a specified rent and for a specified term, and the plaintiff filed a bill for specific performance, stating the above agreement, and that it was further agreed that he, the plaintiff, should pay a premium of £200, which, by his claim, he offered to do; the defendant, acknowledging that the terms were such as the plaintiff represented them, insisted that, as the written agreement did not provide for those terms, the statute was a good defence. It was held, however, that this additional term did not render the statute a good defence, and Knight Bruce, L. J., said—“Our opinion is, that when persons sign a written agreement upon a subject obnoxious, or not obnoxious, to the statute that has been so particularly referred to (r), and there has been no circumvention, no fraud, nor (in the sense in which the term ‘mistake’ must

(q) *Joyne v. Statham*, 3 Atk. 388.

(r) 29 Car. II. c. 3.



be considered as used for the purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document; subject to this, that either of the parties sued in equity upon it may perhaps be entitled, in general, to ask the court to be neutral, unless the plaintiff will consent to the performance of the omitted term" (s). In such cases as these, the court interferes for the purpose of reforming the contract, and not rescinding it. "No doubt," says Lord Hardwicke (t), "but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that, if reduced into writing contrary to intent of the parties, on proper proof, that would be rectified."

The defendant may ask the court to be neutral, unless the plaintiff will perform the omitted term.

The case of *Townshend v. Stangroom* (u), affords a strong illustration of the above-mentioned distinction between the rights of a plaintiff and of a defendant setting up a parol variation to a written contract. There a lessor filed a bill for the specific performance of a written agreement for a lease, with a variation as to the quantity of land to be included in the lease, supported by parol evidence. The lessee filed a cross-bill for specific performance of the written agreement without the parol variation. Lord Eldon dismissed both bills; the first, because the parol evidence was not admissible on behalf of the lessor seeking specific performance; the second, because it was admissible when adduced by such lessor, as *defendant*, for the purpose of showing that by mistake or surprise the written agreement did not contain the terms intended to be introduced into it (v).

*Townshend v. Stangroom*,—as to difference between plaintiff seeking and defendant resisting specific performance.

(s) *Martin v. Pycroft*, 2 De G. M. & G. 785; *Parker v. Taswell*, 2 De G. & Jo. 559.

(t) *Henkle v. Roy. Ex. Assoc. Co.*, 1 Ves. Sr. 317.

(u) 6 Ves. 328; *Smith v. Wheatcroft*, 9 Ch. Div. 223.

(v) *Woolam v. Hearn*, 2 L. C. 468.

*Secus*—where a misunderstanding as to terms of agreement.

But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract into writing, but that one party understood one thing, and the other another, there is no contract at all in such a case, for want of the *assensus ad idem*, and the plaintiff's bill is consequently dismissed (*w*).

(*b.*) Where the parol variation is subsequent to the contract.

(*b.*) Where the parol variation, which the plaintiff or defendant seeks to set up is a subsequent agreement in parol between the parties to a written agreement, the case in nowise comes within the doctrine of mistake, and the parol variation is inadmissible under the Statute of Frauds, except in cases where the refusal to perform it might amount to fraud (*x*); or unless there have been such acts of part-performance as would justify a decree in the case of an original substantive agreement (*y*).

(4.) Misdescription,—according as it is substantial or not.

Another common ground of defence to an action for specific performance is, that, by a misdescription of the property, the defendant has purchased what he never intended to purchase. Under this defence, two classes of cases arise :—

1. Cases where the misdescription is of a substantial character, and will not, in justice, admit of compensation.

2. Cases where the misdescription is of such a character as fairly to admit of compensation.

Where the misdescription is of a

In cases of substantial misdescription. The principle governing this class of cases is thus summed up

(*w*) *Legal v. Miller*, 2 Ves. Sr. 299.

(*x*) See observations of Sir W. Grant in *Price v. Dyer*, 17 Ves. 364.

(*y*) *Legal v. Miller*, 2 Ves. Sr. 299; *Van v. Corpe*, 3 My. & K. 269, 277.

by Lord Eldon (z):—"The court is, from time to time, approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take at all that which he did not mean to have."

substantial character, it is a good defence.

The question whether a misdescription is a substantial one or not, is one concerning which no general rule can be laid down. Each case will be decided on its own particular facts.

Whether misdescription is substantial, is a matter of evidence.

(A.) Cases where vendor seeks specific performance. (A.) Purchaser

Where property sold as copyhold turned out to be partly freehold, it was held that the vendor could not compel specific performance, notwithstanding a special condition providing that errors in the description should not invalidate the sale. It was insisted for the vendor that freehold was better than copyhold, but the Master of the Rolls said:—"It is impossible to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to another. *The motives and fancies of mankind are infinite*, and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another" (a).

not compelled to take,—  
(a.) Freehold instead of copyhold.

So a purchaser is not compelled to take an under-lease instead of an original lease (b). So again where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the Corporation of London, specific performance was refused (c). In the case of the sale of a residence and four acres of land, it having turned out that there was

(b.) Under-lease instead of original lease.

(z) *Knatchbull v. Grueber*, 3 Mer. 146; and see *Jaques v. Millar*, L. R. 6 Ch. Div. 153.

(a) *Ayles v. Cox*, 16 Beav. 23; *Drewe v. Corp.*, 9 Ves. 368; *Wright v. Howard*, 1 S. & S. 190; *Hart v. Swaine*, L. R. 7 Ch. Div. 42.

(b) *Madeley v. Booth*, 2 De G. & Sm. 718.

(c) *Peers v. Lambert*, 7 Beav. 546.

no title to a slip of ground of about a quarter of an acre between the house and the highroad, the Master of the Rolls said:—"Under ordinary circumstances, this would be a case for compensation; but here is a house, with a long strip of land between it and the road, to which there is no title, so that the people in passing can look in at the window. This is not a case for compensation" (*d*).

Where the difference is slight, and a proper subject for compensation, it will be enforced with compensation, as where acreage is deficient.

Where, however, in the eye of the court the difference is not material, and is such that it is a proper subject for compensation, the court will enforce the contract, at the suit of the vendor, compelling him to make compensation to the purchaser. For example, where there was an objection to the title of six acres out of a large estate, and these did not appear material to the enjoyment of the rest (*e*), specific performance was nevertheless decreed. So again, where fourteen acres were sold as water-meadow, and twelve only answered that description, it was held a fit subject for compensation (*f*). And, *nota bene*, that after conveyance of the estate, there can be no claim made for compensation (*g*).

No compensation where there has been fraud.

Nor where the compensation cannot be estimated.

The principle of granting compensation in lieu of rescinding the contract, in case of any error or misstatement, will never be applied where there has been fraud or misrepresentation (*h*). It is also a necessary principle that, where there are no data from which the amount of compensation can be ascertained, the court cannot enforce the contract with compensation. But

(*d*) *Perkins v. Ede*, 16 Beav. 193; *Knatchbull v. Grueber*, 3 Mer. 124.

(*e*) *M'Queen v. Farquhar*, 11 Ves. 467; *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609.

(*f*) *Scott v. Hanson*, 1 R. & My. 128.

(*g*) *Manson v. Thacker*, 7 Ch. Div. 620; *Besley v. Besley*, 9 Ch. Div. 103. But see *In re Turner and Skelton*, W. N. 151.

(*h*) *Clermont v. Tasburgh*, 1 J. & W. 120; *Price v. Macaulay*, 2 De G. M. & G. 339, 344. But see *Powell v. Elliott*, L. R. 10 Ch. App. 424.

this objection is one which the courts are unwilling to entertain (*i*).

(B.) Where purchaser seeks specific performance.

(B.) Purchaser can compel specific performance, and may at the same time insist on an abatement.

The law is thus laid down by Sir William Grant in *Hill v. Buckley* (*j*):—"Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation." "If," observes Lord Eldon, "a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell the estate, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the objection of the vendor, that the purchaser cannot have the whole" (*k*).

Vendor must sell what interest he has, if purchaser elect.

Courts of equity will not, however, at the suit of a purchaser, compel a partial performance of a contract which is unreasonable or prejudicial to third parties interested in the property (*l*), nor where the deficiency as to the extent or duration of an interest contracted to be sold does not admit of compensation (*m*).

Partial performance not compelled, where unreasonable or prejudicial to third parties.

(*i*) *Ramsden v. Hirst*, 4 Jur. N. S. 200; *Brooke v. Rounthwaite*, 5 Hare, 298; *Powell v. Elliott*, *supra*.

(*j*) 17 Ves. 401; *Horrock v. Rigby*, 9 Ch. Div. 180; but see *Durham v. Legard*, 34 L. J. Ch. 589.

(*k*) *Morilock v. Buller*, 10 Ves. 315; *Wilson v. Williams*, 3 Jur. N. S. 810; *Seaman v. Vawdrey*, 16 Ves. 390; *Painter v. Newby*, 11 Hare, 26; *Barker v. Cox*, L. R. 4 Ch. Div. 464; *M'Kenzie v. Hesketh*, L. R. 7 Ch. Div. 675.

(*l*) *Thomas v. Dering*, 1 Keen, 729; *Beeston v. Stutley*, 6 W. R. 206.

(*m*) *Balmanno v. Lumley*, 1 V. & B. 225; *Ridgway v. Gray*, 1 Mac. & G. 109.

(5.) Lapse of time.

The objection that a plaintiff has not performed his part of the contract at the time specified, may furnish grounds of defence to suits for specific performance.

At law, time always of the essence of the contract.

At law, the plaintiff must show that all those things which are on his part to be performed, have been performed within a reasonable time, or, where time is specified by the contract, within the time so specified.

Equity is guided by the nature of the case as to time.

At law, time used to be always of the essence of the contract (*n*); but in equity, the question of time was differently regarded; for a court of equity discriminated between those terms of a contract which were formal, and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which were of the substance and essence of the agreement (*o*); and applying to contracts those principles which had governed its interference in relation to mortgages (*p*), it had held time to be *prima facie* non-essential, and had accordingly granted specific performance of agreements after the time for their performance had been suffered to pass, by the party asking for the intervention of the court, if the other party had not shown a determination to proceed.

When lapse of time is a bar in equity.

There were, however, certain cases where lapse of time was a bar to relief even in equity. Thus—

(a.) Where time was originally of the essence of the contract.

(a.) Those cases where time was originally of the essence of the contract; and this whether made so by the express agreement of the parties (*q*), or from the nature of the subject-matter with which the parties were dealing, as in the case of reversionary interests (*r*).

(*n*) *Stowell v. Robinson*, 3 Bing. N. C. 928.

(*o*) *Parkin v. Thorold*, 16 Beav. 59.

(*p*) Per Lord Eldon in *Seton v. Slade*, 7 Ves. 273.

(*q*) *Hudson v. Bartram*, 3 Mad. 440; *Honeyman v. Marryat*, 21 Beav.

14, 24.

(*r*) *Hipwell v. Knight*, 1 Y. & C. Exch. Ca. 416; *Withy v. Cottle*, T. & R. 78; *Walker v. Jeffreys*, 1 Hare, 341.

(b.) Those cases where, though time was not originally of the essence of the contract, it was engrafted upon it by subsequent notice (s).

(b.) Where time was made of the essence of the contract by subsequent notice.

(c.) Cases where the delay had been so great as to constitute laches, disentitling the party to the aid of the court, and evidencing an abandonment of the contract irrespectively of any peculiar stipulations as to time (t).

(c.) Where lapse of time was evidence of laches or abandonment.

And now the rules of equity as to whether time is or not of the essence of the contract prevail at law also (u).

Law and equity now agree.

It has already been pointed out, that courts of equity will never countenance fraud, and that where there is reason to believe that a contract is tainted with fraud, the court will refuse relief unless the party seeking its aid comes with clean hands, and has a conscientious title to relief (v). If, therefore, there has been actual misrepresentation (w), or fraudulent suppression of the truth (x), equity will refuse to enforce specific performance; and the defrauded person may even rescind the contract (y).

(6.) The plaintiff has not "clean hands."

Although, as a general rule of equity, inadequacy of consideration, except in cases of sales of reversionary interests (z), and except where fraud or imposition

(7.) Great hardship in the contract.

(s) *Taylor v. Brown*, 2 Beav. 180; *Benson v. Lamb*, 9 Beav. 502; *Macbryde v. Weekes*, 22 Beav. 533.

(t) *Moore v. Blake*, 2 Ball. & B. 62; *Milward v. Thanet*, 5 Ves. 720 n; *Eads v. Williams*, 4 De G. M. & G. 691; *Mills v. Haywood*, L. R. 6 Ch. Div. 196.

(u) Judicature Act, 1873, § 25, sub-sec. 7; *Noble v. Edwards*, 5 Ch. Div. 378.

(v) *Harnett v. Yielding*, 2 S. & L. 554; *Reynell v. Spyre*, 1 De G. M. & G. 660.

(w) *Brooke v. Rounthwaite*, 5 Hare, 298; *Higgins v. Samels*, 2 J. & H. 460; *Farebrother v. Gibson*, 1 De G. & Jo. 602.

(x) *Drysdale v. Mace*, 5 De G. M. & G. 103; *Shirley v. Stratton*, 1 Bro. C. C. 440.

(y) *In re Bannister*, W. N. 1879, p. 64.

(z) *Playford v. Playford*, 4 Hare, 546; and see *supra*, p. 476.

is presumed, is not a ground for refusing specific performance (*a*); still, as the aid by equity in such cases is discretionary, a contract which would work a great hardship will not be enforced, but the plaintiff will be left to his remedy at law (*b*).

(8.) The contract involves the doing of an unlawful act or breach of trust.

So again, as we have already seen, specific performance of an agreement to perform an unlawful act (*c*), or which would involve a breach of trust, will not be enforced (*d*).

(9.) The contract is not established.

Also, if the alleged contract is no contract, that is, if it is not a complete contract as such, but is incomplete as a contract simply, whether because of some condition precedent not having been performed or from any other cause whatever, the court will not enforce specific performance of it, because that would first be to make the contract (*e*). But a mere uncertainty in the amount of the land agreed to be sold, if that uncertainty is removable upon an inquiry, will not bar the right to specific performance (*f*).

(10.) The contract is already executed.

And finally, if the contract is no longer executory, but is executed by possession delivered or otherwise, then (in the absence of other equities) the court, *semble*, will not enforce it, because it is, of course, enforced already (*g*); *secus*, if there is an equity to enforce the contract (*h*).

(*a*) *Sullivan v. Jacob*, 1 Moll. 477.

(*b*) *Wedgwood v. Adams*, 6 Beav. 600, 8 Beav. 103; *Watson v. Marston*, 4 De G. M. & G. 230, 239; *Tildesley v. Clarkson*, 30 Beav. 419; *Peacock v. Penson*, 11 Beav. 355.

(*c*) *Howe v. Hunt*, 31 Beav. 420; *Harnett v. Yielding*, 2 Sch. & Lef. 554.

(*d*) *Mortlock v. Buller*, 10 Ves. 292; *Rede v. Oakes*, 13 W. R. 303; *Sneesby v. Thorne*, 7 De G. M. & G. 399.

(*e*) *Rossiter v. Miller*, L. R. 5 Ch. Div. 648; on App. 3 App. Ca. 1124; *Williams v. Jordan*, L. R. 6 Ch. Div. 517; *Winn v. Bull*, L. R. 7 Ch. Div. 29; *Hudson v. Buck*, L. R. 7 Ch. Div. 683. But distinguish *Bonnewell v. Jenkins*, 8 Ch. Div. 70.

(*f*) *Chattock v. Muller*, 8 Ch. Div. 177.

(*g*) *Tress v. Savage*, 4 Ell. & Black. 36; *Haigh v. Jaggar*, 16 Mee. & Wel. 525; 2 Coll. Ch. Ca. 231.

(*h*) *Parker v. Taswell*, 2 De Gex. & Jo. 559.



## CHAPTER X.

## INJUNCTION.

AN injunction is a writ remedial, issuing by order of a court of equity, and now also by order of a court of law, in cases where the plaintiff is entitled to equitable relief; and its general purpose is to restrain the commission or continuance of some act of the party enjoined (*a*). Definition.

The object of the writ or order is generally preventive and protective rather than restorative, although it may also be restorative. It seeks to prevent a meditated wrong more often than to redress an injury already done. It is not confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive jurisdiction. It is treated of, however, in this place principally because it forms a broad foundation for the exercise of the concurrent jurisdiction in equity. Its object is preventive rather than restorative.

The writ of injunction was and still is peculiarly an instrument of the court in its Chancery Division, though there were some cases where courts of law, even before the Common Law Procedure Act, 1854, and the Judicature Acts, 1873-75, were accustomed to exercise analogous powers, as by the writ of prohibition and estrepement in cases of waste (*b*). The cases, Jurisdiction of equity arose from want of adequate remedy at law.

---

(*a*) Joyce on Injunctions, 1.

(*b*) *Jefferson v. Bishop of Durham*, 1 Bos. & P. 105, 120-132.

however, to which these common law processes were applicable, were so few, and the processes themselves were so utterly inadequate for the purposes of justice, that the jurisdiction at law fell practically into disuse, and almost all the remedial justice of this sort came to be administered through the instrumentality of courts of equity. The jurisdiction of these courts, then, had its true origin in the fact that there was either no remedy at all at law, or the remedy at law was imperfect and inadequate.

The cases in which courts of equity interfered by way of injunction were usually classed under two heads :—

Two classes of injunctions,—prior to Judicature Acts.

I. Injunctions to prevent the inequitable institution or continuance of judicial proceedings ; and,

II. Injunctions to restrain wrongful acts unconnected with judicial proceedings.

Judicature Acts,—the changes effected by.

But now, under the Judicature Act (c), 1873, s. 24, sub-sect. 5, no cause or proceeding pending in the High Court of Justice or before the Court of Appeal shall be restrained by injunction, excepting in a bankruptcy or winding-up proceeding, after order made (d) ; but every matter of equity, which would formerly have been a ground for an injunction either absolute or conditional, may now be pleaded as a defence to the action, and the Court or Division before which the action is pending may upon the like grounds direct a stay of proceedings in the action, either general or interim, as shall appear to be just. And by the same Act, s. 25, sub-sect. 8, an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be “just or con-

(c) 36 & 37 Vict. c. 66.

(d) *In re Landore Siemens Steel Co.*, 10 Ch. Div. 489.

venient" (e) that such order should be made, and the order may be either with or without any conditions, and either before, or at, or after, the trial of the action, against any threatened or apprehended waste or trespass, and whether or not the person sought to be enjoined is in possession under any claim of title or otherwise, or (not being in possession) claims the right merely to do the act in question, and irrespectively of the circumstance of the estates of the parties, or of any or either of them, being legal or equitable.

In consequence of these provisions of the Judicature Act, injunctions properly so called now fall under one head only, that is to say, the second of the two heads above mentioned; and all orders in the nature of an injunction, which prior to that Act fell under the first of these two heads, would now be orders staying proceedings merely (f).

Instead of injunction of first class, now order to stay proceedings.

Premising thus much, we propose to state, firstly, the cases in which formerly an injunction would have issued, but now only a stay of proceedings; and, secondly, the cases in which an injunction properly so called may issue.

I. Injunctions to restrain judicial proceedings, and now being merely orders to stay the proceedings.

I. Orders to stay proceedings,—cases for.

At first sight it might have seemed that a court of equity in granting an injunction against a proceeding in a court of common law, detracted from the dignity of that court and interfered with its process; and until the reign of James I., the Common Law Judges as strenuously resisted this exercise of equitable jurisdiction as the Chancellors asserted it (g). But there was no just foundation for the opposition of the courts of

The old injunction in equity did not interfere with the jurisdiction of the common law courts.

(e) *Day v. Brownrigg*, 10 Ch. Div. 294.

(f) *Wright v. Redgrave*, 11 Ch. Div. 24.

(g) Hallam's Const. Hist. vol. i. p. 472.

Equity acted *in personam* on the conscience of the person enjoined.

common law to the equitable jurisdiction. A writ of injunction was in no real sense a prohibition to those courts in the exercise of their jurisdiction. It was not addressed to those courts. It did not even affect to interfere with them. The process, when its object was to restrain proceedings at law, was directed *only to the parties*. It neither assumed any superiority over the court in which those proceedings were had, nor denied its jurisdiction. It was granted on the sole ground, that from certain equitable circumstances, of which the court of equity granting the process had cognisance, it was against conscience that the party inhibited should proceed in the cause. Equity, in short, acted *in personam*. In all cases, therefore, where by accident, mistake, or fraud, or otherwise, a party had an unfair advantage in proceedings in a court of law, which must necessarily have made that court an instrument of injustice, and it was therefore against conscience that he should use that advantage, a court of equity would restrain him from using that advantage which he had thus improperly gained; and in the like case the Court of Common Law would now do the like justice in the premises, either by admitting the equitable defence, or by staying the proceedings on the ground thereof.

Courts of equity might restrain proceedings in a foreign court, if the parties were within their jurisdiction, and they may still do so.

Upon the same principle, although the courts of one country had no authority to stay proceedings in the courts of another, they had an undoubted authority to control all persons and things within their own territorial limits. Where, therefore, both parties to a suit in a foreign country were resident within the jurisdiction of the court of equity, it would restrain either party from proceeding in a suit out of its jurisdiction. They did not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they considered the equities between the parties, and decreed *in personam* according

to those equities, and enforced obedience to their decrees by process *in personam* (*h*). And, *semble*, any division of the court may now do the like in a proper case.

It would be difficult to enumerate all the cases where courts of equity would grant an injunction, whether generally or to stay proceedings at law. They afforded this relief not only where the defendant would have a complete remedy at law if he were in possession of the appropriate proofs, but also where the rights of the parties were wholly equitable in their nature, or incapable, under the circumstances, of being asserted in a court of law. A brief enumeration of some of the cases in which a court of equity granted this mode of relief will best illustrate the scope of its jurisdiction, and will also show the cases in which at the present day a stay of proceedings in the action would be directed.

Where an instrument had been obtained by fraud or undue influence, the court of equity would restrain proceedings at law on it. Thus, where a young man, an officer in the army, soon after coming of age, became liable upon bills of exchange, for the accommodation of his superior officer, to the defendant, a money-lender by profession; and upon negotiations for getting in the bills, the defendant agreed to postpone them for twelve months, and induced the plaintiff, upon representations of his trouble and expense in procuring the postponement of the bills, to give him, in consideration of such trouble and expense, a further promissory note; the court not finding in the answer a satisfactory explanation of these transactions, sustained an injunction against the defendant proceeding at law upon his

Equity granted relief where the remedy at law would be complete if proofs could be had; and also in cases of purely equitable rights.

(1.) Equity restrained proceedings on an instrument obtained by fraud or undue influence; and now a stay of proceedings may be directed in such a case.

---

(*h*) *Portarlington v. Soulby*, 3 My. & K. 106; *Hope v. Carnegie*, L. R. 1 Ch. 320; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416-437.

securities (*i*). In the like case, the court of law would direct a stay of proceedings in the action, and might even dismiss the action altogether or direct a verdict for the defendant.

(2.) Where assets had been lost by an executor or administrator without his default, equity restrained proceedings at law by creditors; and now a stay of proceedings may be directed in such a case.

Suppose, again; an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire, or by a robbery, without any default on his part, a great portion of them should be destroyed, so that the estate should be deeply insolvent; in such a case he might have been sued by a creditor at law, and would have had no defence; for when he once became chargeable with the assets at law, he was for ever chargeable, notwithstanding any intervening casualties. But courts of equity would restrain proceedings at law, in cases of this sort, upon the purest principles of justice (*j*); and now the courts of common law would stay the proceedings, or even direct a verdict for the defendant (*k*).

(3.) A party who had only an equitable title protected against one who had a bare legal title.

So again, where a party had only an equitable title, a plaintiff at law, having only a legal title, would be restrained from pursuing that title in a court of common law. Thus, in *Newlands v. Paynter* (*l*), personal chattels were bequeathed to a single woman for her separate use, but without the intervention of trustees, so that the property legally belonged to (*i.e.*, the legal estate was in) her husband upon her subsequent marriage with him; and after the marriage this property was taken in execution for the debt of her husband, who at law was (as already stated) the legal owner; it was held, however, that the husband was a trustee for his wife, and an injunction was issued to restrain the

(*i*) *Lloyd v. Clark*, 6 Beav. 309; *Tyler v. Yates*, L. R. 11 Eq. 265.

(*j*) *Crosse v. Smith*, 7 East, 258; *Croft v. Lyndsey*, Freem. Ch. 1.

(*k*) And see *Job v. Job*, 26 W. R. 206; L. R. 6 Ch. Div. 562; *Mayer v. Murray*, 8 Ch. Div. 424.

(*l*) 4 My. & Cr. 408.

sale under the writ (*m*). And now a court of law would itself restrain or stay the execution against the wife's property.

Another class of cases in which injunctions were granted against proceedings at law, was where there had already been a decree upon a creditor's bill for the administration of assets. Such a decree was considered in equity to be in the nature of a judgment for all the creditors; and, therefore, if subsequently to it a bond creditor should sue at law, the court of equity in which the decree was made would, in the assertion of its jurisdiction, restrain him from proceeding in his suit (*n*). And now the court of law would stay the action, and probably direct it to be transferred to the Chancery Division (*o*).

(4.) Injunction on a creditor's action for administration.

A party would not be permitted to sue for the same thing and for the same purpose, in equity as well as in another court, but would be put to his election to sue in one or the other (*p*). The only exception to this general rule was the case of a mortgagee, who might pursue all his remedies, whether at law or in equity, concurrently (*q*); but in all cases, even in the exceptional case of a mortgagee, the actions would probably *now* be brought on together in some manner or other.

(5.) A party cannot bring several suits for one and the same purpose.

Courts of equity would grant an injunction to protect their own officers, who executed their processes, against any suits brought against them for acts done under or in virtue of such processes. The ground of

(6.) Equity protected its own officers who executed the processes of the court.

(*m*) *Langton v. Horton*, 3 Beav. 464; *Pylke v. Northwood*, 1 Beav. 152.

(*n*) *Morrice v. Bank of England*, Cas. t. Talb. 217; *Perry v. Phelps*, 10 Ves. 38, 39; *Burles v. Popplewell*, 10 Sim. 383.

(*o*) Disting. *Crowle v. Russell*, 4 C. P. Div. 186.

(*p*) *Vaughan v. Welsh*, Mos. 210; *Gedge v. Montrose*, 5 W. R. 537.

(*q*) See *Palmer v. Hendrie*, 27 Beav. 349; *Schoole v. Sall*, 1 S. & L. 176.

this assertion of the jurisdiction was, that courts of equity would not suffer their processes to be examined by any other courts. If the processes were irregular, it was the duty of the courts of equity themselves to apply the proper remedy (*r*). And courts of law would always do the like; so that as regards this matter, law and equity already agreed before the Judicature Acts were passed.

In what cases equity would not stay proceedings at law.  
(1.) In criminal matters, or in matters not purely civil.

There were, however, cases in which courts of equity would not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they would not interfere to stay proceedings in any criminal matters, or in cases not strictly of a civil nature; as, for instance, on an indictment, or a mandamus, or a criminal information. But this restriction applied, of course, only to cases where the parties seeking redress by such proceedings were not also the plaintiffs in equity; for if they were, the court possessed power to restrain them personally from proceeding at the same time upon the same matter of right in both a civil suit and a criminal prosecution (*s*). Regarding actions of libel, the court of equity would not usually restrain them; they were, in fact, actions exclusively appropriate to the courts of common law where a jury could be had (*t*).

(2.) Where the ground of defence was equally available at law, and had not been taken or maintained there.

A court of equity had no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity rested upon a ground equally available at law and in equity, unless the plaintiff could establish some special equitable ground for relief (*u*). And after

(*r*) *May v. Hook*, cited 2 Dick. 619; *Walker v. Micklethwait*, 1 Dr. & Sm. 49; *Re James Campbell*, 3 De G. M. & G. 585.

(*s*) *Holderstaffe v. Saunders*, 6 Mod. 16; *Montague v. Dudman*, 2 Ves. Sr. 396; *Mayor of York v. Pilkington*, 2 Atk. 302; St. 893.

(*t*) *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. App. 142. But see *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. Div. 582; and *Hinrichs v. Berndes*, W. N. 1878, p. 11.

(*u*) *Harrison v. Nettleship*, 2 My. & K. 423.



equitable defences could be pleaded at common law under the Common Law Procedure Act, 1854, still less would equity give relief (*v*). It was no ground for equitable interference that a party had not effectually availed himself of a defence at law, or that a court of law had erroneously decided a point of pure law (*w*).

"It is not sufficient," says Lord Redesdale, "to show that injustice has been done, but that it has been done under circumstances that authorise the court to interfere. Because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. The inattention of the parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognisable at law, and also in equity, and of which cognisance cannot be effectually taken at law; and, therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has had an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has been already discussed in a court of law, a matter capable of being discussed there, and over which a court of law had full jurisdiction" (*x*).

As a rule, a matter duly adjudicated on by a common law court cannot be reopened in equity.

---

(*v*) *Farebrother v. Welchman*, 3 Drew. 122.

(*w*) *Simpson v. Howden*, 3 My. & Cr. 108; *Protheroe v. Forman*, 2 Swanst. 227, 233; *Ware v. Horwood*, 14 Ves. 31.

(*x*) *Bateman v. Willoe*, 1 Sch. & Lef. 204-205; *Leitch v. Leitch*, 11 Gr. 81.

Of course, in all such cases, the proper course is to appeal.

Equitable defences allowed at common law.

By the Common Law Procedure Act, 1854 (y), the courts of common law obtained power to receive pleas of defence on equitable grounds. The equitable plea, however, was only admissible in such cases as, having regard to the machinery of the courts of law and the forms of proceedings therein, complete justice could thereby be done between the parties. In all other cases, therefore, where the defendant would have been only entitled to such a modified relief as could not properly be dealt with by a court of law, he would still have had to resort to a court of equity. In *Jeffs v. Day* (z), Blackburn, J., says:—"Under the Common Law Procedure Act, 1854, we have jurisdiction to entertain equitable defences; but we can only allow such pleas to be pleaded as, if proved, would be a *simple bar* to the action, and would entitle the defendant to the common law judgment, 'that the plaintiff take nothing by his writ, and that the defendant go thereof without day,' *which would in effect be equivalent to a perpetual injunction in a court of equity.*"

But only in cases in which courts of equity would grant an unconditional and perpetual injunction.

Defendant cannot be compelled to plead an equitable defence at law.

Although there was an equitable defence at law, the defendant could not be compelled to plead such equitable defence, but might at once come into equity for an injunction to restrain the action. The Common Law Procedure Act was only permissive. To say that where a man had a good equitable defence, he must proceed at law, and plead that equitable defence, would have been in effect to make imperative that which the legislature had made optional (a). But since the Judicature Acts, this option is in effect taken away; and the defendant at law may now plead equitable de-

(y) 17 & 18 Vict. c. 125, s. 83.

(z) L. R. 1 Q. B. 374.

(a) *Gompertz v. Pooley*, 4 Drew. 453; *Kingsford v. Swinsford*, 28 L. J. Ch. 413.

fences of every kind and degree of weight, and he *must*, in fact, do so if he would avail himself of them at all. He certainly cannot now come into equity to restrain the action on any such grounds. And when there has been an agreement to refer to arbitration, an order staying the action may now be made in a proper case (b).

II. Injunctions to restrain wrongful acts unconnected with judicial proceedings.

II. Injunctions against wrongful acts of a special nature.  
Two classes.

The equitable jurisdiction under this head may be divided into two classes.

1. Injunctions to enforce a contract (express or implied) or to forbid a breach thereof.

2. Injunctions to prevent a tort, that is, a wrong independent of contract.

1. With reference to injunctions to enforce a contract, or to forbid a violation of its terms, the jurisdiction of equity may be said to be co-extensive with its power to compel specific performance. Whatever duty a court of equity will compel a party to perform, it will generally, on the other hand, restrain him from neglecting to perform (c). And in many cases, where, from the nature of the subject-matter, the court does not decree specific performance, on the ground of its inability to carry such a decree into effect, it will grant an injunction to restrain the doing of an act contrary to the tenor of the contract; and in effect, though indirectly, it compels thereby a specific performance of the contract. Thus in the case of *Catt v. Tourle* (d),

1. Injunction in cases of contract.

Supplemental to the jurisdiction to compel specific performance.

(b) *Law v. Garrett*, 8 Ch. Div. 26; and distinguish *Mulkern v. Lord*, 4 App. Ca. 182.

(c) Drew. on Injunctions, 250.

(d) L. R. 4 Ch. 654. And see *Cooke v. Chilcott*, L. R. 3 Ch. Div. 694; *Luker v. Dennis*, L. R. 7 Ch. Div. 227; and distinguish *Master v. Hansard*, L. R. 4 Ch. Div. 718; *Renals v. Cowlishaw*, 9 Ch. Div. 125.

the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted that he should have the exclusive right of supplying beer to any public-house erected on the land so sold. The defendant, a member of the society, who was also a brewer, acquired a portion of the land, *with notice of the covenant*, and erected on it a public-house, which he supplied with his own beer. On a bill filed to restrain the defendant from supplying beer, the court held that the covenant, though in terms positive, was in substance negative, and granted an injunction accordingly.

Injunction a mode of specific performance of negative agreements.

It is evident that where a contract is not to do a thing, which contract is capable of being enforced in equity, it may be, and naturally is, enforced by the court by means of an injunction restraining the doing of that act (*e*). Therefore, where an agreement was entered into between the plaintiffs (who resided very near the church of Hammersmith) of the one part, and the parson, churchwardens, overseers, and certain inhabitants of the parish of the other part, by which the plaintiffs covenanted to erect a new cupola, clock, and bell to the church; and the parties of the second part covenanted that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of the plaintiffs, should not be rung during the lives of the plaintiffs, or the survivors of them; the plaintiffs performed their part of the agreement, but the bell, after two years, was rung again; the agreement was specifically enforced against the parish authorities by means of an injunction against ringing the bell in breach of the agreement (*f*).

Court of

It seems to be now settled that the inability of

(*e*) *Lumley v. Wagner*, 1 De G. M. & G. 615.

(*f*) *Martin v. Nutkin*, 2 P. Wms. 266; *Barret v. Blagrave*, 5 Ves. 555; S. C. 6 Ves. 104; Fry on Spec. Perf. 329; *Broder v. Saillard*, L. R. 2 Ch. Div. 692; *Richards v. Revitt*, L. R. 7 Ch. Div. 224.

equity to compel the specific performance of one part of an agreement, is not *per se* a ground for its refusing to enjoin against the breach of another part of the same agreement. Thus, in *Lumley v. Wagner (g)*, J. W. agreed with W. L. that she would sing at B. L.'s theatre during a certain period of time, and would not sing elsewhere without his written authority. The court granted an injunction against J. W. singing at a rival theatre. The Lord Chancellor said:—"The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff, and the other by the defendant, . . . but of an act to be done by J. W. alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent and operating together with, the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre.

equity may restrain the breach of part of an agreement, though it cannot compel specific performance of the rest.

"It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant, J. W., from any other theatre, while the court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her

engagement. The jurisdiction which I now exercise is wholly within the power of the court; and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce" (*h*).

No specific performance where court cannot secure performance by the plaintiff.

But where the terms of a contract are such that the court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance; and if, on non-performance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, and where the contract cannot be split into two separate and independent portions, and the negative part enforced, grant an injunction to restrain acts, the doing of which is inconsistent with the maintenance of the contract (*i*).

Injunction, although the contract is implied only.

It is not only in the case of express contracts of the kinds above illustrated that equity interposes by injunction to restrain conduct contrary to their tenor, but also in implied contracts resulting from the acts or representations of the parties.

If a representation is made inducing another to do an act, equity restrains the contrary.

Thus, it is a very old head of equity jurisdiction, that if a person makes a representation to another as an inducement to him to act, and he thereupon acts upon the faith of that representation, the former shall make it good. *A.*, the lessee of a building lease, in which there was a covenant to erect houses on three plots of land in a specified manner, sold one of the houses to *B.*, the plaintiff's predecessor in title, to whom he represented that he was restricted from building, so as to obstruct the sea view. *A.*, in the

(*h*) *Montague v. Flockton*, L. R. 16 Eq. 189. But see *Wolverhampton Railway v. London and North-Western Railway*, L. R. 16 Eq. 440; *Fothergill v. Rowland*, L. R. 17 Eq. 141.

(*i*) *Joyce on Injunctions*, 204; *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Company*, 11 W. R. 874.

sub-lease granted to B., covenanted to observe the lessee's covenants in the original lease, but subsequently surrendered the old lease to his lessor, and a new lease without the restrictive covenant was granted to him in lieu thereof; and A. commenced building, contrary to the original covenant. Upon a bill filed by the plaintiff, it was held that he was entitled to an injunction (*j*).

It has upon similar principles been held that where a person claiming a title in himself is privy to the fact that another party is dealing with the property as his own, he will be restrained from asserting his own title against a title created by such other person, although he derives no benefit from the transaction (*k*). And the same doctrine is applicable where a person having a title to an estate stands by and suffers a person ignorant of it to expend money upon the estate. In such cases, the person who has so expended money will, in equity, be indemnified for his expenditure on eviction, by the real owner, for it would be inequitable for him to profit by his own fraud (*l*).

A party claiming a title in himself, and standing by while another deals with the property as his own, re-restrained.

2. Injunctions to prevent a tort, *i.e.*, a wrong independent of contract. 2. Injunctions against torts.

It may be laid down as a general rule, that wherever a right exists, or is created, a violation of that right will be prohibited, subject to the limitation that the right is cognisable by law. It follows, therefore, that the restraining process of equity will apply to the whole range of rights and duties which are recognised as enforceable at law. But it should also be remembered that though the jurisdiction of equity is in principle so extensive, it is restrained and modified

Wherever there is a right, there is a remedy for its breach, if the right be cognisable by a court of justice.

(*j*) *Piggott v. Stratton*, 1 De G. F. & Jo. 33; *Slim v. Croucher*, 1 De G. F. & Jo. 518.

(*k*) *Nicholson v. Hooper*, 4 My. & Cr. 186.

(*l*) *Neesom v. Clarkson*, 4 Hare, 97; *Dann v. Spurrier*, 7 Ves. 235.

by considerations of expediency and convenience; and that equity will not interfere where the breach of a duty or the violation of a right may be completely and adequately paid for by damages at law, or where other reasons of justice and convenience are against the intervention of equity. It is proposed now to consider a few of the more important and representative cases in which equity interferes by injunction to restrain breaches of duty or violations of right.

**1. Jurisdiction in cases of waste.**

**1. In cases of waste.**

Waste may be defined as a destructive or material alteration of things forming an essential part of the inheritance (*m*).

Arose from incompetency of common law. Common law powers over waste.

The jurisdiction of equity to restrain waste arose, as in most other cases, from the original incompetency of the common law to give adequate relief. The ancient jurisdiction at common law with regard to waste may be thus shortly stated. By the Statutes of Marlebridge (*n*), of Gloucester (*o*), and of Westminster (*p*), a writ of waste might be brought by him who had the immediate estate of inheritance in reversion or remainder against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years; it might also be brought by one tenant in common or joint-tenant against another who wasted the estate held in common or joint-tenancy. But it did not lie between *coparceners* (*q*); and in many other cases also the courts of law had no effective jurisdiction in waste.

In what cases equity interferes.

Courts of equity, on the other hand, by no means limited themselves to an interference in the cases above mentioned provided for by statute. They extended

(*m*) Tudor's Real Property Cases, 90.

(*n*) 52 Hen. III.

(*o*) 6 Edw. I. c. 5.

(*p*) 13 Edw. I. c. 22.

(*q*) 3 Black. Com. 227, 228; *Jefferson v. Bishop of Durham*, 1 Bos. & Pull. 120.



this salutary relief to cases where the remedies provided in the courts of common law could not be made to apply ; and to cases where the titles of the parties were purely of an equitable nature ; and to cases where the waste was what is commonly, although with no great propriety of language, termed equitable waste (*r*), meaning acts which were deemed waste only in courts of equity ; and to cases where no waste had been actually committed, but was only meditated or apprehended ; equity, in all these cases, interfered by a bill *quia timet*, or other bill for an injunction (*s*).

Equitable waste.

In the first place, there were many cases where a person was punishable at law for committing waste, and yet a court of equity would enjoin him. As where there was a tenant for life, remainder for life, remainder in fee, the tenant for life would be restrained by injunction from committing waste ; although, if he did commit waste, no action of waste could lie against him at law by the remainder-man for life, for he had not the inheritance ; nor by the remainder-man in fee, by reason of the interposed remainder for life (*t*).

Cases where a person is punishable at law.

So where a tenant for life held his estate without impeachment of waste, he might fell timber, open new mines or pits, and have full property in the produce (*u*). This was his legal right, and if, in exercising that right, he was guilty of malicious, extravagant, and capricious waste, such as pulling down and dismantling a mansion-house (*v*), or felling timber planted or left standing for ornament or shelter of a mansion-house or grounds (*w*),

As where a tenant for life abuses his legal right to commit waste.

(*r*) *Downshire v. Sandys*, 6 Ves. 109, 110. But see now 36 & 37 Vict. c. 66, s. 25, § 3.

(*s*) St. 912.

(*t*) *Garth v. Cotton*, 1 Ves. Sr. 524, 555, s. c. ; 1 L. C. 751.

(*u*) Co. Litt. 220 a ; *Lewis Bowles's Case*, 11 Co. 79 b.

(*v*) *Vane v. Barnard*, 2 Vern. 738.

(*w*) *Rolt v. Somerville*, 2 Eq. Ca. Abr. 759 ; *Morris v. Morris*, 15 Sim. 505 ; *Micklethwaite v. Micklethwaite*, 1 De G. & Jo. 519.

Tenant in tail after possibility of issue extinct.

there was no remedy at common law, yet he would be restrained in equity. And the same rule was applied to a tenant in tail after possibility of issue extinct, who had the same power to commit waste as a tenant for life, without impeachment of waste (*x*).

Cases where the aggrieved party has purely an equitable title.

In the next place, courts of equity granted an injunction in cases where the aggrieved party had a purely equitable right, and, indeed, it has been said that these courts would grant it more strongly where there was a trust estate (*y*). Thus, for instance, in cases of mortgages, if the mortgagor in possession should fell timber on the estate, and thereby the security would become insufficient, but not otherwise, a court of equity would restrain the mortgagor by injunction (*z*). On the other hand, a mortgagee in possession would not be permitted to waste the estate, unless the security proved defective, in which case the court would not restrain him from felling timber, the produce being, of course, applied in ease of the estate (*a*).

Mortgagor and mortgagee.

Permissive waste not remediable in equity.

It seems that courts of equity had no jurisdiction in cases of permissive waste by a tenant for life having the legal estate (*b*); permissive waste being defined as an act of omission—as not doing repairs, whereby houses were suffered to fall into decay (*c*). Moreover, no injunction will now be granted to stay ameliorative waste (*d*).

Waste under the Judicature Act, 1873.

Under the Judicature Act, 1873, the jurisdiction of equity in all these cases substantially remains, notwithstanding that by that Act (*e*), the distinction between legal and equitable waste is in effect abolished, and

(*x*) *Att.-Gen. v. D. of Marlborough*, 3 Madd. 538; *Abraham v. Bubb*, 2 Swanst. 172. (*y*) *Robinson v. Litton*, 3 Atk. 209.

(*z*) *King v. Smith*, 2 Hare, 239; *Russ v. Mills*, 7 Gr. 145.

(*a*) *Withrington v. Banks*, Sel. Ch. Ca. 31.

(*b*) *Powys v. Blagrove*, Kay, 495; 4 De G. M. & G. 448.

(*c*) Inst. 145.

(*d*) *Doherty v. Allman*, 3 App. Ca. 709.

(*e*) Sect. 25, sub-sect. 3.

courts of law may now give damages and even an injunction in the case of equitable waste; and notwithstanding also that by the same Act (*f*), the courts of law (or common law divisions of the High Court) equally with the Courts of Equity (or Chancery Division) are enabled and are compellable to recognise all equitable estates and titles.

## 2. In cases of nuisances.

## 2. Nuisances.

In cases of public nuisances, properly so called, an indictment or a criminal information lies to abate them, and to punish the offenders. But a civil information lies in equity to redress the grievance by way of injunction. Thus, informations have been maintained against a public nuisance occasioned by stopping a highway (*g*). But the question of nuisance or not is eminently one for a jury, although the court may indeed try the question of fact itself, under Rolt's Act hereinafter mentioned, or under the provisions regarding the trial of questions of fact contained in the new orders and rules under the Judicature Acts, 1873-75.

Public nuisances abated by indictment, but sometimes also by an injunction on information filed.

As a general rule, a suit of this nature is instituted by the Attorney-General, or he is made a party, as representing the public. But when a private person suffers a special and peculiar injury distinct from that of the public in general, in consequence of a public nuisance, he will be entitled to an injunction and relief in equity, and he may thus compel the wrong-doer to take active measures against allowing the injury to continue, and in such a case the Attorney-General is not a necessary party to the action (*h*).

Public nuisance causing special damage,—ground for a merely civil action.

In regard to private nuisances, the interference of Equity has

(*f*) Sect. 24, sub-sect. 1.

(*g*) *Att.-Gen. v. Cleaver*, 18 Ves. 217; *Ripon v. Hobart*, 3 My. & K. 169, 179.

(*h*) *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

jurisdiction  
in cases of  
private nui-  
sances,—in a  
merely civil  
action.

courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing vexatious and interminable litigation, or of preventing multiplicity of suits. It is not, however, every nuisance that will justify the interposition of a court of equity. There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanently or increasingly mischievous character, must occasion a constantly recurring grievance, which cannot be otherwise prevented, save by an injunction (*i*). Thus it has been said, that every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, the person committing it ought to be restrained; so also, if there is a claim of right to do it, that is a sufficient ground for an injunction (*j*). So a mere fanciful diminution of the value of property by a nuisance, without irreparable mischief, will not furnish any foundation for equitable relief (*k*).

Where injury  
is irreparable.

On the other hand, where the injury is irreparable, as where loss of health (*l*), loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act, in every such case courts of equity will interfere by injunction (*m*). Thus, for example, where a party builds so near the house of another party as to darken his windows, against the clear rights of the latter, either by contract or by ancient possession, courts of equity will interfere by injunction to prevent the nuisance, as

Darkening  
ancient lights.

(*i*) *Fishmongers' Co. v. East India Co.*, 1 Dick. 163.

(*j*) *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. Div. 769; and see *Goodson v. Richardson*, L. R. 9 Ch. App. 221.

(*k*) *Att.-Gen. v. Nicholl*, 16 Ves. 342; and see *Sturges v. Bridgeman*, 11 Ch. Div. 852.

(*l*) *Walter v. Selfe*, 20 L. J. Ch. 433.

(*m*) *Wynstanley v. Lee*, 2 Swanst. 335; *Broudbent v. Imp. Gas Co.*, 7 De G. M. & G. 436.

well as to remedy it, if already done. The injury is material, and operates daily to destroy or diminish the comfort and use of the adjoining house; and the remedy by a multiplicity of actions for the continuance of it would furnish no substantial compensation (*n*). And this reason is much stronger in the case of nuisances arising from the pollution of streams (*o*).

Upon the same principle, it has been held that a landowner has a right, independently of prescription, to the lateral support of his neighbour's land, so far as that is necessary to sustain the soil of his land in its natural state, and also to compensation for damages caused either to the land or buildings upon it by the withdrawal of such support, it being established that the additional weight of the buildings had nothing to do with the subsidence of the soil. And he may acquire, by twenty years' enjoyment, the right to lateral support for the buildings also erected on the land (*p*).

Rights to lateral support of soil.

Of soil with buildings on it.

So equity will interfere to prevent the pollution of streams, causing injury to the riparian owners. In *Att.-Gen. v. Borough of Birmingham* (*q*), Wood, V.-C., thus expresses himself—"Now the plaintiff's rights are these: he has a clear right to enjoy the river, which, before the defendant's operations, flowed unpolluted—or, at all events, so far unpolluted that fish could live in the stream, and cattle would drink of it—through his grounds, for three miles and upwards, in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish, which were accustomed to frequent it, may not be driven elsewhere. . . . As regards the discretion the court

Pollution of streams.

(*n*) *Att.-Gen. v. Nichol*, 16 Ves. 338; *Wynstanley v. Lee*, 2 Swanst. 335; *Theed v. Debenham*, L. R. 2 Ch. Div. 165; *N. P. Insurance Co. v. P. Assurance Co.*, L. R. 6 Ch. Div. 757; *Aynsley v. Glover*, L. R. 10 Ch. App. 283; *Leech v. Schweder*, L. R. 9 Ch. App. 463.

(*o*) *Pennington v. Brinsop Hall Coal Co.*, *supra*.

(*p*) *Hunt v. Peake*, Johus. 705.

(*q*) 4 K. & J. 546.

Plaintiff  
would other-  
wise have to  
bring a series  
of actions.

should exercise where such right exists, if the plaintiff finds the river so polluted as to be a continuous injury to him; if, in order to assert his right, he would be obliged to bring a series of actions, one every day of his life, in respect of every additional injury to his cattle, or every additional annoyance to himself (not to mention the permanent injury which he would sustain in having the water—which, as it passes along the course of his land, is his property—so damaged that he cannot use it), then the court will properly exercise its discretion by granting an injunction to relieve him from the necessity of bringing a series of actions, in order to obtain the damages to which such continual and daily annoyance entitles him.”

Further pollu-  
tion of streams.

This interference of equity to prevent the pollution of streams is available also for preventing the further pollution of a stream that is already comparatively polluted (<sup>r</sup>), such further pollution being, of course, sensible and not merely fanciful.

3. Patents,  
copyright, and  
trade-marks.

### 3. Cases of patents, copyright, and trade-marks.

It is in order to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, that courts of equity interfere in cases of patents for inventions, and in cases of copyrights to secure the rights of the inventor or author.

Damages at  
law utterly in-  
adequate.

It is quite plain that if no other remedy could be given in cases of patent and copyright than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights. Besides, in cases of this nature, mere damages

---

(<sup>r</sup>) See *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. Div. 769; *Crossley v. Lightowler*, L. R. 3 Eq. 279, and S. C. on appeal L. R. 2 Ch. App. 478; and distinguish *Baxendale v. M'Murray*, L. R. 2 Ch. App. 790.

would often give most inadequate relief. For example, in the case of a copyright, the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book, which he might otherwise have sold, but it may also be injuring him to an incalculable extent in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain (s).

The jurisdiction will be exercised in all cases where there is a clear colour of title, founded upon long possession and assertion of right. Even an equitable interest, limited in point of time or extent, is sufficient. But a mere agent to sell has not such a real interest in a work as will entitle him to relief (t). The question of piracy or no piracy is at the present day usually decided by the court, on a personal inspection of the book; but if necessary, an issue will be directed at law (u).

Jurisdiction,  
when exer-  
cised.

(A.) In cases, however, where a patent has been granted for an invention, it is not a matter of course for courts of equity to interpose by way of injunction. If the patent had been but recently granted, and its validity had not been ascertained by a trial at law, the court would not generally act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction; but it would require the validity to be ascertained by a trial in a court of law if the defendant denied its validity, or put the matter in doubt (v). But if the patent had been granted for some length of time, and the patentee had put the invention into public use, and had had an exclusive

(A.) Patents:  
Injunction is  
not a matter  
of course; de-  
pends on cir-  
cumstances.  
Has validity  
of patent been  
established?

Has it been in  
existence for  
a long time?

(s) *Hogg v. Kirby*, 8 Ves. 223.

(t) *Nicol v. Stockdale*, 3 Swanst. 687.

(u) *Copinger on Copyright*, 118, 119.

(v) *Martin v. Wright*, 6 Sim. 297; *Saunders v. Smith*, 3 My. & Cr. 711, 728.

possession under his patent for a period of time, which might fairly create the presumption of an exclusive right, the court would ordinarily interfere by way of injunction. And now in all cases, the court will determine for itself, or procure to be determined by a jury the preliminary question of the validity before granting an injunction, subject, however, to the following distinctions:—

Three courses open to the court upon an interlocutory application.

(a.) Injunction *simpliciter*.

(b.) Interim injunction, plaintiff undertaking as to damages.

(c.) Injunction directed to stand over, until trial, defendant keeping an account.

Where the application is for an interlocutory injunction, several courses are open; the court may at once grant the injunction *simpliciter*, without more—a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual and more wholesome practice in such a case, of either granting an interim injunction, and at the same time requiring the plaintiff to give an undertaking as to damages, or of suspending the grant of the injunction until the trial, the defendant in the meantime keeping an account (*w*).

(B.) Copyright. No copyright in irreligious, immoral, or libellous works.

(B.) There are some peculiar principles applicable to cases of copyright, which are not generally applicable to patents for inventions. In the first place, the plaintiff must make out his title to the copyright, by registration and otherwise. Secondly, no copyright can exist consistently with principles of public policy in any work of a clearly irreligious, immoral, libellous, or obscene description; because, in order to establish such a claim, the author must in the first place show a right to sell the work, and this he cannot do, he himself being unable to acquire a property therein (*x*). In the case of an asserted piracy of such a work, if it be a matter

---

(*w*) *Bacon v. Jones*, 4 My. & Cr. 433, 436,—adapted to suit the modern practice; see *Plimpton v. Spiller*, L. R. 4 Ch. Div. 286.

(*x*) *Copinger on Copyright*, 48.



of any real doubt whether it falls within such a description or not, courts of equity will not interfere by injunction to prevent or restrain the piracy, but will leave the party to his remedy at law (y). And this rule is not altered by the Judicature Acts,—thus far at least, viz., that the court, while retaining the action, will direct an issue to be tried at the assizes, and thereafter will grant or refuse the injunction according as the jury find the work to be moral or the opposite.

In the next place, in cases of copyright, difficulties often arise in ascertaining whether there has been actual infringement thereof. It is, for instance, clearly settled not to be an infringement of the copyright of a book to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it, or to make a *bonâ fide* use of the same common materials in the composition of another work. But what constitutes a *bonâ fide* use of extracts, or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials, is often a matter of most embarrassing inquiry. The true question, it has been said, in all these cases, is, whether there has been a legitimate use of the copyright publication, by the fair exercise of a mental operation deserving the character of a new work (z). But if one, instead of searching into the common sources, and obtaining his materials from them, should avail himself of the labour of his predecessor, and adopt his arrangement, or do it with only a colourable variation, it would be an infringement of the copyright. But it is no infringement where an author has been led by an earlier writer to consult authorities referred to by him, even though he may quote the same passages from those authorities which were used by the earlier writer (a).

What is an infringement of copyright.

*Bonâ fide* quotations, a *bonâ fide* abridgment, or *bonâ fide* use of common materials, not an infringement.

Identical quotations,—even when suggested by earlier writers.

(y) *Lawrence v. Smith*, Jacob, 472; *Walcot v. Walker*, 7 Ves. 1.

(z) *Campbell v. Scott*, 11 Sim. 31; *Lewis v. Fullarton*, 2 Beav. 6.

(a) *Pike v. Nicholas*, L. R. 5 Ch. 251.

Neither is it an infringement if nothing material is taken (b).

Maps, calendars, tables, &c.

The general doctrine on copyright in publications of the class of maps, road-books, calendars, chronological and other tables, is not very easily reducible to any accurate definition. Here the materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials. The difficulty here is to distinguish what belongs to the exclusive labours of a single mind, from what are the common sources of the materials of the knowledge used by all. Suppose, for instance, the case of maps; one man may publish the map of a country; another man, with the same design, if he has equal skill and opportunity, may by his own labour produce almost a fac-simile. He has certainly a right so to do. But he is not at liberty to copy that map, and claim it as his own. He may work on the same original materials; but he cannot exclusively and evasively use those already collected and embodied by the skill, industry, and expenditure of another. The fact of copy or no copy is generally ascertained, in the absence of direct evidence, by *the appearance in the alleged copy of the same inaccuracies or blunders that are to be found in the first published work*. But this is a mode of inference which must be applied with caution (c).

Copyright in lectures.

In *Abernethy v. Hutchinson* (d), it was held that when persons are admitted as pupils or otherwise to hear lectures, although they were orally delivered, and although the parties might go to the extent of putting down the whole by means of shorthand, yet they can do that only for the purposes of their own information,

(b) *Chatterton v. Cave*, 3 App. Ca. 483.

(c) *Wilkins v. Aikin*, 17 Ves. 424; *Longman v. Winchester*, 16 Ves. 269.

(d) 1 H. & Tw. 40; s. c. 3 L. J. Ch. 209.

and cannot publish for profit that which they have not obtained the right of selling. And, consequently, another person, who, in the absence of evidence as to how he came by them, must in the opinion of the court have obtained them from a pupil, would be restrained. Copyright in lectures is now, under certain conditions, protected by legislative enactment (*e*).

There may be a valid copyright in the mere title to a book, *e.g.*, in the title "Trial and Friendship" (*f*). Copyright in title of book.

As to private letters, whether on literary subjects or on matters of private business, personal friendships or family concerns, a learned writer lays down the following conclusions (*g*):— Copyright in letters on literary subjects or private matters.

1. That the writer of private letters has such a qualified right of property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees (*h*). 1. The writer may restrain their publication.

2. That the party written to has such a qualified right of property in the letters written to him as will entitle him, or his personal representative, to restrain the publication of them by a stranger (*i*). 2. The party written to may also restrain their publication by a stranger.

3. That such qualified right may be displaced by reasons of public policy, or by some personal equity (*j*). 3. Publication permitted on grounds of public policy.

An injunction will be granted to restrain the publication of an unpublished manuscript. This doctrine Injunction against publication of an

(*e*) 5 & 6 Will. IV. c. 65.

(*f*) *Weldon v. Dicks*, 10 Ch. Div. 247.

(*g*) *Drew. on Inj.*, 208, 209.

(*h*) *Pope v. Curl*, 2 Atk. 342; *Gee v. Pritchard*, 2 Swanst. 402.

(*i*) *Granard v. Dunkin*, 1 Ball & Beat. 207; *Thompson v. Stanhope*, Amb. 737.

(*j*) *Perceval v. Phipps*, 2 V. & B. 19; *Joyce on Injunctions*, 351, 352.

unpublished  
manuscript.

appears to have been first established in the case of the *Duke of Queensberry v. Shebbeare* (k). In that case, the plaintiff claimed, as administrator of A., a descendant of Lord Clarendon, to restrain the defendant from publishing the "History of the Rebellion;" and the defendant claimed, under a delivery by A. of the original manuscript to the father of another defendant, with permission to take a copy and make what use he thought fit of it. But it was held, that it was not to be presumed that Lord Clarendon meant the defendant's ancestor to have the profit of multiplying the work in print, though he might make any other use of it except that (l).

(C.) Trade-  
marks.  
Injunction  
against use of  
trade-marks  
does not de-  
pend on pro-  
perty, but be-  
cause equity  
will not pre-  
mit fraud.

(C.) With regard to the use of trade-marks, and generally to the enjoyment of a particular trade designation, the right to protection does not seem to depend upon a property in them, but on the principle that *the court will not allow fraud to be practised upon private individuals or upon the public*. "This right cannot properly be described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation: it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark" (m). The principle will be seen by a comparison of the following cases. In *Burgess v. Burgess* (n), where a father had for many years exclusively sold an article under the title of "Burgess's Essence of

*Burgess v.*  
*Burgess.*  
A man cannot  
be restrained

(k) 2 Eden. 329; Copinger on Copyright, 24-33.

(l) *Prince Albert v. Strange*, 1 Mac. & G. 25; 1 H. & Tw. 1.

(m) *Parina v. Silverlock*, 6 De G. M. & G. 217. And see Trade-Marks Registration Act, 1875 (38 & 39 Vict. c. 91), and the Amendment Act, 1876 (39 & 40 Vict. c. 33); and *In re Mitchell's Trade-Mark*, 7 Ch. Div. 36; *Singer Manuf. Co. v. Loog*, W.N. 1879, p. 152.

(n) 3 De G. M. & G. 897.

Anchovies," the court would not restrain his son from selling a similar article under that name, no fraud being proved. Knight Bruce, L. J., said—"All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers had done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there anything else that this defendant has done in question before us. He follows the same trade as that his father follows, and has long followed, namely, that of manufacturer and seller of pickles, preserves, and sauces; among them one called 'Essence of Anchovies.' He carries on the trade in his own name, and sells his essence of anchovies as 'Burgess's Essence of Anchovies,' which, in truth, it is. If any circumstance of fraud, now material, had accompanied, and were continuing to accompany, the case, it would stand very differently. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Burgess's essence of anchovies. That does not give him such an exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name" (o). In the case of *Cocks v. Chandler* (p), the bill was filed by the successor in title of the inventor of a sauce known as "Reading Sauce," to restrain a rival manufacturer from selling his preparation under the name of "The Original Reading Sauce;" and on proof by the plaintiff that he alone was entitled to the original receipt, and that on that ground his sauce had attained a high reputation in the market, an injunction was granted against the

from using his own name as vendor of an article.

If there be no fraud on his part.

*Cocks v. Chandler*—Use of word "Original" a fraud on the public.

(o) See also *Christie v. Christie*, W. N. 1875, p. 3; *Cope v. Evans*, L. R. 18 Eq. 138.

(p) L. R. 11 Eq. 446; *Marshall v. Ross*, L. R. 8 Eq. 651; *Crawford v. Shuttock*, 13 Gr. 149; *Davis v. Kennedy*, 13 Gr. 523.

use by the defendant of the word "original," *as being a device to mislead the public* (q).

Cairns's and  
Rolt's Acts,—  
objects of.

Before leaving this branch of the Concurrent Jurisdiction of the Court of Chancery, it is appropriate briefly to mention certain legislative enactments, which (prior to the Judicature Acts, 1873-75), had to a considerable extent increased the power and usefulness of the Court of Chancery, by conferring on it powers heretofore exclusively belonging to the courts of common law.

Lord Cairns's  
Act,—  
Equity may  
give damages  
where it has a  
jurisdiction to  
grant injunction or specific  
performance.

By Lord Cairns's Act (r), it was enacted that *in all cases in which the court had jurisdiction* to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, in all these cases it should be lawful for the same court, if it should think fit, to award damages to the party injured *either in addition to, or in substitution for*, such injunction, and such damages might be assessed in such manner as the court should direct.

May assess  
damages with  
or without a  
jury, or direct  
an issue.

By subsequent sections, provision was made for the assessment of damages, and the trial of questions of fact, either by a jury before the court itself, or by the court alone, or for the assessment of damages by a jury before any judge of one of the superior courts of common law, at *nisi prius*, or at the assizes, or before a sheriff, as is done in writs of inquiry at common law (s).

---

(q) See also *Raggett v. Findlater*, L. R. 17 Eq. 29; *Cheavin v. Walker*, L. R. 5 Ch. Div. 850; *Siebert v. Findlater*, 7 Ch. Div. 801; *Braham v. Brachim*, 7 Ch. Div. 848.

(r) 21 & 22 Vict. c. 27.

(s) 21 & 22 Vict. c. 27, ss. 2-6. And see *Jaques v. Millar*, L. R. 6 Ch. Div. 153.

With reference to the construction and application of this Act, the following points were settled :—

Construction and effect of the Act.

1. That the statute did not extend "the jurisdiction of the court to cases where there was a plain common law remedy, and where, before the statute, the court would not have interfered" (*t*).

1. Equity jurisdiction not extended where there was a plain common law remedy.

2. "Where a plaintiff came to the court for the specific performance of a contract which could not be performed at all, there damages could not be given in lieu of specific performance" (*u*).

2. Damages not given where the contract could not be performed at all.

3. So, again, there could be no relief in a court of equity "where a bill was filed for damages, and damages only" (*v*).

3. No relief where damages only were asked for.

4. But though as a general rule damages would be awarded only as incidental to granting specific performance or an injunction, yet damages might be given, where the evidence was insufficient to support a case for an injunction (*w*).

4. Damages when injunction not granted.

5. But the court cannot, in its discretion, give damages in lieu of an injunction where the plaintiff makes out his right to an injunction (*x*).

5. Injunction and not damages.

6. Where a court had jurisdiction to compel specific performance of a part of a contract, it had also power under the statute to award damages for the breach of another part of that contract, in respect of which it could not have compelled specific performance. Thus

6. Where court might compel specific performance of one part of an agreement, it might give damages

(*t*) *Wicks v. Hunt*, Johnson, 380.

(*u*) Per Wood, V.-C., in *Middleton v. Magray*, 2 H. & M. 236; *Rogers v. Challis*, 27 Beav. 175; *Scott v. Rayment*, L. R. 7 Eq. 112.

(*v*) *Middleton v. Magray*, 2 H. & M. 237; *Lewers v. Earl of Shaftesbury*, L. R. 2 Eq. 270.

(*w*) *City of London Brewery Company v. Tennant*, L. R. 9 Ch. 212.

(*x*) *Krehl v. Burrell*, 7 Ch. Div. 551; 10 Ch. Div. 146.

for breach of another part or for the whole. plaintiff agreed to grant a lease to defendant when and so soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and to pull down an old house then standing on the land, and build a new one on the site. It was held that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. Wood, V.-C., said—"Now, it is perfectly true that I cannot act until I have jurisdiction, and under the existing law, before the passing of this Act, a court of equity had no jurisdiction in respect of a building contract of this description. But it would have had jurisdiction, before the passing of the Act, to compel the defendant to accept a lease on the plaintiff waiving the condition which he for his own benefit inserted—that he should not be called upon to grant a lease until a certain time. The defendant has agreed to accept a lease when required, and the court has therefore jurisdiction. The statute would not apply to a case where the object of the agreement was simply the building of the house under such conditions and on such terms that, it may be assumed, the court could not grant specific performance; and in such a case, a plaintiff could not file a bill to have damages instead of specific performance, because there would be no jurisdiction. But there is a distinct agreement here, not only to build the house, but to accept the lease. *The court, having therefore acquired jurisdiction, may give damages, either in addition to or in substitution for, specific performance.* The meaning of the statute can only be, that, where the court has jurisdiction in the suit, it may award damages in substitution for specific performance" (y).

---

(y) *Soames v. Edge*, John. 669; *Middleton v. Greenwood*, 2 De G. J. & S. 142.



The construction put upon Lord Cairns's Act, limiting and defining the cases in which equity has or has not jurisdiction to give damages remains substantially unaltered by the Judicature Acts, 1873-75.

By Rolt's Act (z), it was enacted, that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought in any Chancery cause or matter, whether the title to such relief or remedy was or was not incident to, or dependent upon, a legal right, every question of law or fact cognisable in a court of common law on the determination of which the title to such relief or remedy depended, should be determined by or before the same court; or, when more convenient, an issue or issues might be directed to be tried at the assizes; and in all cases, subject to the court's being of opinion in a matter of concurrent jurisdiction that the case was properly brought into equity (a).

Sir John  
Rolt's Act,—  
Determination  
of legal ques-  
tions.

The provisions of this Act have not been substantially altered by the Judicature Acts, 1873-75.

On the other hand, the courts of common law were invested with equitable powers, and might grant an injunction as in equity; for by the Common Law Procedure Act, 1854 (b), s. 79, it was enacted that in all cases of breach of contract or other injury, where the party injured was entitled to maintain *and had brought an action*, he might in like case and manner as thereinbefore provided with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like

Injunction at  
common law.

An action  
must have  
been already  
commenced.

(z) 25 & 26 Vict. c. 42.

(a) *Durell v. Pritchard*, L. R. 1 Ch. App. 244.

(b) 17 & 18 Vict. c. 125.

kind, arising out of the same contract, or relating to the same property or right; and he might, in the same action, include a claim for damages or other redress (*c*).

---

(*c*) *Mayall v. Higbey*, 31 L. J. Exch. 329; *Jessel v. Chaplin*, 2 Jur. N. S. 931.

## CHAPTER XI.

## PARTITION.

ANOTHER head of Concurrent Jurisdiction is that of partition of real estate, when held by joint-tenants or tenants in common.

The ground of this jurisdiction has been thus stated by Lord Redesdale:—"In the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and upon return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties (*a*)."

Origin of jurisdiction.

The common law remedy by writ of partition was at an early period found inadequate and incomplete, on account of the various and complicated interests which in process of time arose out of or attached to the ownership of real estate. Moreover, courts of law were content merely to declare the rights of the parties, and were incapable of effectuating the partition by directing the execution of mutual conveyances. It was for these and other reasons, *e.g.*, the necessity of

Writ of partition at law inadequate.

---

(*a*) Mitford on Pleading, 120.

the discovery of titles, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity, and their ability to clear away all intermediate obstructions against complete justice, that these latter courts assumed a general concurrent jurisdiction with courts of law in all cases of partition. And in so doing they usually followed the analogies of the law; and decreed partition in such cases as the courts of law recognised as fit for their interference. But courts of equity were not, therefore, to be understood as limiting their jurisdiction in partition to cases cognisable or relievable at law; for there was no doubt that they might interfere in cases where a partition would not be at law; as, for instance, where an equitable title was set up (*b*).

Reversioner cannot maintain suit for partition.

A suit for partition cannot be maintained by a person interested as a joint-tenant or tenant in common in reversion; and for this reason, that it would be unreasonable that a reversioner should be permitted to disturb the existing state of things, as where lands in the possession of a tenant for life become on his death divisible among several as tenants in common (*c*). And of course a bill or action for partition will not lie where the purpose of the action is not partition, but to prove the legal title (*d*).

Nor person claiming under disputed legal title.

Provisions of Trustee Act, 1850, when persons interested are under incapacity.

In suits for partition, difficulties often arose owing to the incapacity of persons interested in the property, which it was desired should be divided. But now, where any decree has been made by the court for a

---

(*b*) *Wills v. Slade*, 6 Ves. 498; *Cartwright v. Pulteney*, 2 Atk. 380.

(*c*) *Evans v. Bagshaw*, L. R. 8 Eq. 469; L. R. 5 Ch. 340.

(*d*) *Giffard v. Williams*, L. R. 5 Ch. 546; *Slade v. Barlow*, L. R. 7 Eq. 296.

partition, or for a sale in lieu of a partition (*e*), of any lands, the court may declare that any of the parties to the suit, wherein the decree is made, are trustees of such lands, or any part thereof within the meaning of the Trustee Act, 1850; or that the interests of unborn persons who might claim under any party to the suit, or by other ways mentioned in the Act, are the interests of persons who, upon coming into existence, would be trustees within the meaning of the Act; and thereupon the Lord Chancellor, intrusted by the sign manual with the care of the persons and estates of lunatics, may, as to any lunatic or person of unsound mind, or the Court of Chancery may, in other cases, make such orders as to the estates, rights, and interests of such persons, born or unborn, as he or the court might, under the provisions of the Act, make concerning the estates, rights, and interests of trustees born or unborn (*f*). Accordingly, if any of the persons interested are infants, lunatics, or persons of unsound mind, the court will carry into effect the decree for partition, by making an order vesting their shares in such persons as the court shall direct (*g*).

Formerly a partition was usually made by a commission issued to inspect and apportion the estate among the several persons entitled. Now, however, it is more usually made upon a reference to chambers, or (but very rarely) by the decree at the hearing.

Partition, how made.

Where the property is small, and the persons interested are many, the difficulties in the way of carrying a partition into effect were often so great, as to render the step the reverse of beneficial. The court in one case (*h*) directed the partition of a house, and the com-

Difficulties, where property small, of carrying partition into effect.

(*e*) The Partition Act, 1868 (31 & 32 Vict. c. 40), s. 7, amended by the Partition Act, 1876 (39 & 40 Vict. c. 17).

(*f*) Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 30.

(*g*) *Ibid.*, ss. 3, 7, 30; Dan. Ch. Pr. 1031.

(*h*) *Turner v. Morgan*, 8 Ves. 143.

mission having been executed, an exception was taken by the defendant, on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. The Lord Chancellor overruled the exception, saying that he did not know how to make a better partition for them; that he granted the commission with great reluctance, but was bound by authority.

Now remedied  
by sale under  
Partition Acts,  
1868 and  
1876.

These difficulties are now in great measure removed by the Partition Act, 1868, amended by the Partition Act, 1876 (*i*), by which it is provided, that if it appears to the court that, by reason of the nature of the property or of the number of the parties interested, or presumptively interested, or of the absence or disability of some of the parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial than a partition, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others, direct a sale accordingly (*j*). Also, upon the request of a moiety or upwards of the co-owners, the court is required to direct a sale, unless it sees good cause to the contrary (*k*).

Sale,—mode of  
directing.

The sale may be directed on motion upon admissions in the pleadings (*l*); and usually all the co-owners (other than the party having the conduct of the sale) have leave to bid (*m*).

(*i*) 39 & 40 Vict. c. 17.

(*j*) 31 & 32 Vict. c. 40, s. 3; Dan. Ch. Pr. 1019-1022. See *Rowe v. Gray*, L. R. 5 Ch. Div. 263; *Wilkinson v. Joberns*, L. R. 16 Eq. 14; *Drinkwater v. Ratcliffe*, L. R. 20 Eq. 528; *Gilbert v. Smith*, 8 Ch. Div. 548; 11 Ch. Div. 78. And see also Gregory Walker's Manual of the Partition Acts, 1868 and 1876.

(*k*) *Porter v. Lopes*, 7 Ch. Div. 358; *Saxton v. Bartley*, W. N. 1879, p. 94.

(*l*) Order xl. rule 11; *Burnell v. Burnell*, 11 Ch. Div. 213.

(*m*) *Verrall v. Cathcart*, W. N. 1879, p. 100.

## CHAPTER XII.

## INTERPLEADER.

WHERE two or more persons, whose titles were connected by reason of one being derived from the other, or of both being derived from a common source, claimed the same thing, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render it, feared he might be hurt by some of them, he might exhibit a bill of interpleader against them. In this bill he must have stated his own rights and their several claims, and prayed that they might interplead, so that the court might adjudge to whom the thing belonged and he might be indemnified. If any suits at law were brought against him, he might also pray that the claimants might be restrained from proceeding till the right was determined (a). And similarly an injunction would be granted in an interpleader suit, to restrain proceedings in another suit relating to the same subject-matter, imperfect in its frame for lack of parties (b).

Interpleader  
where two or  
more persons  
claim the  
same thing  
from a third  
person.

The remedy by interpleader was not unknown to the common law; but it had a very narrow range of purpose and application. The interpleader at law only existed where there was a joint bailment by both parties (c).

Interpleader  
at law only in  
cases of joint  
bailment.

---

(a) Mitford on Pleading, 58, 59; *Jones v. Thomas*, 2 Sm. & Giff. 186.  
 (b) *Prudential Assurance Company v. Thomas*, L. R. 3 Ch. 74.  
 (c) *Crawshaw v. Thornton*, 2 My. & Cr. 1, 21.

The true origin, then, of the jurisdiction in equity over interpleader was, that there was either no remedy at law, or the legal remedy was inadequate in the given case.

*Mitchell v. Hayne*,—  
Plaintiff to a bill of interpleader must have had no personal interest in the subject-matter.

In order that a party might be entitled to bring a bill for interpleader in equity, it was, however, absolutely essential that he should have no personal interest in the subject-matter of contest. In *Mitchell v. Hayne* (*d*), plaintiff was an auctioneer, and had sold an estate for one of the defendants. The other defendant was the purchaser, and had commenced an action against the plaintiff for the deposit; upon which the plaintiff prayed for an interpleader and injunction, offering, at the same time, to pay the deposit money into court, *after deducting* his commission. The Vice-Chancellor refused the bill, saying, "Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants" (*e*).

*Crawshaw v. Thornton*,—  
Plaintiff must have been under no personal liability.

In the case of *Crawshaw v. Thornton* (*f*), A. deposited certain iron with B. & Co., who were wharfingers, and afterwards directed them to deliver it to C. C. applied to B. & Co. to know the particulars of the iron held by them on his account; and B. & Co. then wrote a letter to C., saying that in compliance with his request, they annexed a note to the landing weights of the iron transferred into his name by A., and now held by them (B. & Co.) at his (C.'s) disposal. B. & Co. subsequently received notice from D. that the iron belonged to him, and that it had been deposited with A. as an agent for sale, and that he with-

(*d*) 2 Sim. & Stu. 63.

(*e*) *Langston v. Boylston*, 2 Ves. Jr. 109. And see *Attenborough v. St. Catherine Docks Co.*, 3 C. T. D. 373, 467.

(*f*) 2 My. & Cr. 1, 19.



out authority pledged it to C. B. & Co. then filed a bill of interpleader against C. and D. It was held that they could not maintain a bill of interpleader, for after their letter to C., C. had a right against them independently of the question whether D. was or was not entitled to the iron. The Lord Chancellor said, "The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them: and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; *because if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs; and the injunction, which is, of course, if the case be a proper subject for interpleader, would deprive a defendant having such a case, beyond the question of property, of part of his legal remedy, with the possibility, at least, of failing in the contest with his co-defendant; in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation.*"

It was essential in an interpleader that the whole of the rights claimed by the defendants should be finally determined by the litigation.

In regard to bills of interpleader, it was not necessary to entitle the party to come into equity that the title of the claimants should be both purely legal. It was sufficient to give jurisdiction, that the one title was legal, and the other equitable (g). Thus, for instance, if a debt or other claim had been assigned, and a controversy arose between the assignor and the assignee respecting the title, a bill of interpleader might be brought by the debtor to have the point

Interpleader where one title was legal and the other equitable.

---

(g) *Paris v. Gilham*, Coop. 56; *Morgan v. Marsack*, 2 Mer. 107.

settled to whom he should pay (*h*). Indeed, where one of the claims was purely equitable, it was formerly indispensable to come into equity; for in such a case there could be no interpleader awarded at law (*i*). But after the Common Law Procedure Act, 1860, courts of law would on an interpleader issue take into consideration the equitable rights of the parties (*j*).

No inter-pleader in case of adverse independent titles not derived from the same common source.

In the case of adverse independent titles, not derived from the same common source, the party holding the property must, it seems, have defended himself as well as he could at law; and he was not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there was no privity of contract between them and the third person who called for the interpleader (*k*).

Agent could not have interpleader against his principal.

It was a settled rule of law, and of equity also, that an agent should not be allowed to dispute the title of his principal to property which he had received from or for his principal; or to say that he would hold it for the benefit of a stranger (*l*). But this doctrine was to be taken with its proper qualifications. For if the principal had created an interest or a lien on the funds in the hands of the agent in favour of a third person, and the nature and extent of that interest or lien was in controversy between the principal and such third person, then the agent might, for his own protection, have filed a bill of interpleader, to compel them

Except where principal had created a lien in favour of a third party.

(*h*) *Wright v. Ward*, 4 Russ. 215.

(*i*) *Bolton v. Williams*, 4 Bro. C. C. 309.

(*j*) *Rusden v. Pope*, L. R. 3 Ex. 269.

(*k*) *Pearson v. Cardon*, 2 Russ. & M. 606, 610.

(*l*) *Dixon v. Hammond*, 2 B. & Ald. 313; *Nickolson v. Knowles*, 5 Madd. 47.

to litigate and adjust their respective titles to the fund (*m*).

Again, a tenant could not file a bill of interpleader against his landlord on notice of ejectment by a stranger under an adverse title to that of the landlord. The reason was manifest; for upon the definition of it, a bill of interpleader was where two persons claimed of a third the same debt or the same duty. Tenant could not file a bill against his landlord, and a stranger claiming by a paramount title.

With regard to the relation of landlord and tenant, the right must have been the object of an ejectment. The law had taken such anxious care to settle the rights arising out of that relation, that the tenant attacked threw himself upon his landlord. He had nothing to do with any claim adverse to his landlord. He put the landlord in his place. If the landlord did not defend for him, he recovered upon his lease a recompense against the landlord. In the case of another person claiming against the title of his landlord, it was clear, unless he derived under the title of the landlord, he could not claim the same debt.

*The rent due upon the demise was a different demand from that which some other person might have upon the occupation of the premises* (*n*). But equity would, even

in the case of a tenant, grant relief if the persons claiming the same rent claimed in privity of contract or tenure, as in the case of a mortgagor and a mortgagee; of a trustee and a *cestui que trust*; or where an estate was settled to the separate use of a married woman, of which the tenant had notice, and the husband had been in receipt of the rent (*o*). In cases of this sort the tenant did not dispute the title of his landlord, but he affirmed that title, and the

Cases where a tenant might bring a bill of interpleader.

(*m*) *Smith v. Hammond*, 6 Sim. 10; *Wright v. Ward*, 4 Russ. 215, 220.

(*n*) *Dungey v. Angove*, 2 Ves. Jr. 310; *Cook v. Rosslyn*, 1 Giff. 167.

(*o*) *Hodges v. Smith*, 1 Cox, 357; *Clarke v. Byne*, 13 Ves. 383; *Johnson v. Atkinson*, 3 Anstr. 798.

tenure and contract by which the rent was payable, and put himself upon the mere uncertainty of the person to whom he was to pay the rent.

Sheriff seizing goods could not file a bill of interpleader.

A bill of interpleader could not be filed by a sheriff who seized goods in execution, on account of the existence of adverse claims to the property. And this arose from the principle involved in the definition of an interpleader, "where two persons claimed of a third the same debt, or the same duty;" and the sheriff, as to one of the defendants, admitted himself a wrongdoer, and might be therefore liable to him for damages, as well as for the goods themselves (*p*). Courts of equity would, however, allow a bill of interpleader to be filed by a sheriff where there were conflicting equitable claims on the property which he had seized (*q*).

Interpleader, under the Judicature Acts, and certain statutes prior thereto.

And by the statutes 1 & 2 Will. IV., c. 58, and 23 & 24 Vict., c. 126, the common law courts acquired a larger power to give relief than that which they had at common law. By the former of these Acts the benefit of an interpleader was extended to the sheriff; and by the latter of them, the parties might have interpleader, although their titles were not derived from one common source. And by Order i., Rule 2, of the new Judicature System, it is provided with respect to interpleader, that the procedure and practice used by courts of common law under the two last-mentioned Acts shall apply to all actions in all the divisions of the High Court of Justice. The application is made by the defendant to a judge at chambers, at any time after service of the writ in the action and after the defendant's appearance thereto, but before delivery of his statement of defence. Apparently, therefore, all

(*p*) *Slingsby v. Boulton*, 1 V. & B. 335.

(*q*) *Daniell's Ch. Pr.* 1416; *Tufton v. Harding*, 6 Jur. N. S. 116; *Hale v. Saloon Omnibus Co.*, 4 Drew. 492; *Dutton v. Furness*, 12 Jur. N. S. 386; s. c. 35 Beav. 461.

the old distinctions between law and equity in respect of interpleader have been merged, and the slow and cumbrous procedure in equity has been abolished, and the procedure at law has been adopted,—but law is now compellable (as we have seen) to take notice of all equitable estates and equities (*r*).

---

(*r*) See Book ii. of this work, “The Practice in Equity,” § 24.

## PART IV.

### THE AUXILIARY JURISDICTION.



#### CHAPTER I.

##### DISCOVERY.

Bill of discovery,—  
nature of.

EVERY bill in equity might properly have been deemed a bill of discovery, since it sought a disclosure from the defendant, on his oath, of the truth of the circumstances constituting the plaintiff's case, as propounded in his bill.

But that which was *par excellence* called a bill of discovery, was a bill which asked no relief, but simply the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds or writings, or other things, in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or action or other proceeding in another court.

Generally an  
action must  
already have  
been commenced.

In general, it was necessary, in order to maintain a bill of discovery, that an action should have been already commenced in another court, to which the discovery would be auxiliary. There were, however, exceptions to this rule, as where the object of the discovery was to ascertain who was the proper party

against whom the suit or action should be brought. But these cases were of rare occurrence (*a*).

The power of the courts of equity to compel discovery arose principally from the original inability of courts of common law to compel a complete discovery of the material facts in controversy by the oaths of the parties to the suit, and also from their original want of power to compel the production of deeds, documents, writings, and other things which were in the custody or power of one of the parties, and were material to the right, title, or defence of the other. Bills of discovery were greatly favoured in equity, inasmuch as they tended to assist and promote the administration of justice in others, and they would be sustained in all cases where some well-founded objection did not exist against the exercise of the jurisdiction.

Jurisdiction in equity arose because at law defendant could not be examined on oath, or be compelled to produce documents.

The principal grounds upon which a bill of discovery might have been resisted were as follows:—

Defences to a bill of discovery.

1. That the subject was not cognisable in any court of justice.
2. That the court would not lend its aid to obtain a discovery for the particular court for which it was wanted.
3. That the plaintiff was not entitled to the discovery by reason of some personal disability.
4. That the plaintiff had no title to the character in which he sued.
5. That the value of the suit was beneath the dignity of the court.
6. That the plaintiff had no interest in the subject-matter, or title to the discovery required, or that an action would not lie for that for which it was wanted.
7. That the defendant was not answerable to the plaintiff, but that some other person had a right to call for the discovery.
8. That the policy of the law exempted the defendant from the

---

(*a*) See *Angell v. Angell*, 1 Sim. & Stu. 83; *City of London v. Levy*, 8 Ves. 404.

discovery. 9. That the defendant was not bound to discover his own title. 10. That the discovery was not material in the suit. 11. That the defendant was a mere witness. 12. That the discovery called for would subject the defendant to a penalty, or forfeiture, or to a prosecution.

Plaintiff seeking discovery must have shown a title.

Heir-at-law during ancestor's life could not have discovery.

But heir-in-tail was entitled to see title-deeds.

It must, therefore, have clearly appeared upon the face of the bill that the plaintiff had a title to the discovery which he sought; a mere stranger could not maintain a bill for the discovery of the title of another person. Hence an heir-at-law could not, during the life of his ancestor, maintain a bill for a discovery of facts or deeds material to the ancestor's estate, for he had no present title whatsoever, but only the possibility of a future title. An heir-at-law had no right even to the inspection of deeds in the possession of a devisee, unless he was an heir-in-tail, in which latter case he was entitled to see the deeds creating the estate tail, but no further.

The plaintiff asking for discovery must have stated a case which would be a good ground of action or defence.

In the next place, the party must not only have shown that he had an interest in the subject-matter of the bill, but he must also have stated a case which would, if he was the plaintiff at law, constitute a good ground of action; or if he was the defendant at law, show a good ground of defence in answer to the action. If it was clear that the action or defence was not maintainable at law, courts of equity would not entertain a bill for any discovery in support of it, since the discovery could not have been material, but must have been useless (*b*).

At least, a *prima facie* case.

If the point, however, was fairly open to doubt or controversy, courts of equity would grant the discovery,

---

(*b*) See *Wallis v. Duke of Portland*, 3 Ves. Jr. 494; *Lord Kensington v. Mansell*, 13 Ves. 240.



and leave it to courts of law to adjudicate upon the legal rights of the party seeking the discovery (*c*).

Courts of equity would not entertain a bill for a discovery to aid the promotion or defence of any action which was not purely of a civil nature. Thus, they would not compel a discovery in aid of a criminal prosecution, for it was against the genius of the common law to compel a party to accuse himself; and it was against the general principles of equity to aid in the enforcement of penalties and forfeitures. Thus in a recent case (*d*), where, on a bill filed by the United States of America, as the successors to the rights and property of the late Confederate States of America, praying for an account and relief in respect of moneys received by the defendant, as agent of the Confederate States, the defendant pleaded that by a law of the United States, the property of all persons who had acted as agents for the Confederate States was liable to confiscation, and that he could not answer without exposing himself to such confiscation, it was held that the plea was a good plea as to the discovery.

No discovery  
in aid of suits  
not purely  
civil.

Or where it  
would cause  
a forfeiture.

Courts of equity would not entertain a bill for a discovery to assist a suit or action in another court, if the latter was of itself competent to exercise the same jurisdiction. But although a party might afterwards have examined his opponent at law under 14 & 15 Vict., c. 99, s. 2, and 17 & 18 Vict., c. 126, ss. 51, 52, and the courts of common law could under these statutes have compelled the production of documents, yet a plaintiff or defendant at law was still entitled to come to equity for discovery in aid of his action or defence; and this was put upon the ground that equity having once acquired jurisdiction over the subject-

No discovery  
in aid of an-  
other court  
which could  
exercise the  
same jurisdic-  
tion.  
Except where  
the other  
court had not  
that power  
originally.

(*c*) *Thomas v. Tyler*, 3 Younge & Col., Ex. 255.

(*d*) *United States of America v. M'Rae*, L. R. 3 Ch. 79

matter, could not lose that jurisdiction by the mere fact of the common law courts also being subsequently invested with the same powers (e).

No discovery  
in aid of arbit-  
ration.

Courts of equity would not entertain bills for a discovery in aid of a controversy pending before arbitrators, for they were not the regular tribunals authorised to administer justice; and being judges of the parties' own choice, the parties had to submit to the inconveniences incidental thereto (f). But courts of equity would grant a discovery in aid of a compulsory reference to arbitration ordered in an action (g).

Except arbit-  
ration were  
compulsory.

Married wo-  
man could not  
be compelled  
to disclose  
facts which  
might charge  
her husband.

No discovery would be compelled where it was against the policy of the law from the particular relation of the parties. Thus, no discovery would lie against a married woman to compel her to disclose facts which might charge her husband. Nor would a person standing in the relation of professional confidence towards another be compelled to disclose the secrets of his client.

Arbitrators  
not compel-  
lable to state  
the ground of  
their award.

In general, arbitrators were not compellable by a bill of discovery to disclose the grounds upon which they made their award, because arbitrators were not obliged by law to give any reason for their award. But if they were charged with corruption, fraud, or partiality, they must have answered that.

No discovery  
against a  
witness.

It was ordinarily a good objection to a bill of discovery that it sought the discovery from a defendant, who was a mere witness, and had no interest in the suit; for, as he might be examined in the suit as a witness, there was no ground to make him a party to

---

(e) *Lovell v. Galloway*, 17 Beav. 1; *British Emp. Shipping Co. v. Somes*, 3 K. & J. 433.

(f) *Street v. Rigby*, 6 Vesey, 821.

(g) *British Emp. Shipping Co. v. Somes*, 3 K. & J. 333.

a bill of discovery, since his answer would not be evidence against any other person in the suit (*h*).

A defendant might object to a bill of discovery, that he was a *bonâ fide* purchaser of the property for a valuable consideration, without notice of the plaintiff's claim. To entitle himself to this protection, however, the purchase must not only have been *bonâ fide*, and without notice, and for a valuable consideration, but the purchase-money must have been paid (*i*). No discovery against a *bonâ fide* purchaser for value without notice.

And not only was a *bonâ fide* purchaser for value without notice protected in equity against a plaintiff seeking to overturn that title; but a purchaser with notice, under a *bonâ fide* purchaser without notice, was entitled to the like protection. For otherwise, it would have happened that the title of such a *bonâ fide* purchaser would have become unmarketable in his hands, and consequently he might have been subjected to great losses, if not utter ruin. Or as against a purchaser with notice from such *bonâ fide* purchaser.

Since the fusion effected by the Judicature Acts, 1873-75, it may be considered that the jurisdiction in equity for discovery merely, that is to say, for discovery in aid of some action in another court or another division of the court, has *ex hypothesi vel definitione* absolutely and altogether ceased, inasmuch as every court or division has now the same power as any other court or division of compelling discovery, whether by interrogatories, or by production and inspection of documents, or by inspection of property or otherwise. But the chapter on discovery, as altered, has been retained in this edition, as likely to prove useful in assisting the student to determine whether or not, or subject to Discovery under the Judicature Acts.

---

(*h*) Dan. Ch. Pr. 255.

(*i*) See *Stanhope v. Earl Verney*, 2 Eden, 81; *Willoughby v. Willoughby*, 1 Term R. 763.

what (if any) restrictions, he may now have discovery in any of the modern ways provided by the New Procedure, and as also furnishing or suggesting various objections to the discovery which may be endeavoured to be obtained by the other side (*j*).

---

(*j*) See *Orr v. Diaper*, L. R. 4 Ch. Div. 92. And compare *Dixon v. Enoch*, L. R. 13 Eq. 400; *Carver v. Pinto Leite*, L. R. 7 Ch. App. 90.

## CHAPTER II.

## BILLS TO PERPETUATE TESTIMONY, AND TO TAKE EVIDENCE

*DE BENE ESSE.*

I. THE object of bills to perpetuate testimony was to preserve and perpetuate evidence when it was in danger of being lost, before the matter to which it related could be made the subject of judicial investigation. Bills of this sort were obviously indispensable for the purposes of public justice, as it might be utterly impossible for a party to bring his rights presently to a judicial decision; and unless, in the meantime, he might perpetuate the proofs of those rights, they were in danger of being lost without any default on his side.

I. Bills to perpetuate testimony. To preserve evidence in danger of being lost before a question could be litigated.

The jurisdiction which courts of equity exercised to perpetuate testimony was open to one great objection. The depositions were not published until after the death of the witnesses. The testimony, therefore, had this infirmity, that it was not given under the sanction of those penalties which the law attaches to the crime of perjury. It was for this reason chiefly that courts of equity did not generally entertain such bills, unless where it was absolutely necessary to prevent a failure of justice (*a*).

The objection was, that the depositions were not published till after death of witness.

If, therefore, it were possible that the matter in controversy could be made the subject of immediate judi-

If matter could be at once litigated,

---

(a) *Angell v. Angell*, 1 Sim. & Stu. 83.

equity refused to perpetuate testimony.

But equity would not refuse if the matter could not by any means be at once litigated.

Equity would not perpetuate evidence of a right which might be barred.

What interest would entitle a plaintiff to file such a bill.

Under 5 & 6 Vict., c. 69, every species of right entitled.

cial investigation, by the party who sought to perpetuate the testimony, courts of equity would not entertain a bill for the purpose. For the party, under such circumstances, had it fully in his power to terminate the controversy by commencing the proper action; and therefore there was no reason for giving him the advantage of deferring his proceedings to a future time, and for substituting written depositions for *vivâ voce* evidence (b). But, on the other hand, if the party who filed the bill could by no means bring the matter in controversy into immediate judicial investigation (which might have happened when his title was in remainder), or if he himself was in actual possession of the property, with reference to which he sought to perpetuate the testimony, in either of these cases equity would entertain a suit for that purpose (c).

On the principle that equity, if possible, will do nothing in vain, the court declined to perpetuate testimony in support of a right of the plaintiff, which might be immediately barred by the defendant, as in the case of a remainder-man filing a bill against the tenant-in-tail in possession (d). As to the question what amount of interest the plaintiff must have possessed in order to entitle him to file a bill to perpetuate testimony, the law was regulated by 5 & 6 Vict., c. 69, by which it was enacted that any person who would, under the circumstances alleged by him to exist, become entitled, *upon the happening of any future event, to any honour, title, dignity or office, or to any estate or interest in any property, real or personal*, the right or claim to which could not by him be brought to trial before the happening of such event, should be entitled to file a bill in Chancery, to perpetuate any

(b) *Ellice v. Roupell* (No. 1), 32 Beav. 299.

(c) St. 1508; *Earl Spencer v. Peek*, L. R. 3 Eq. 415.

(d) *Dursley v. Fitzhardinge*, 6 Ves. 261.

testimony which might be material for establishing such claim or right (*e*).

Before this statute, a mere expectancy or *spes successionis*, as that of an heir-at-law, was not considered sufficient to sustain a bill to perpetuate testimony, though any interest, however small or remote, even though contingent, which the law would recognise, entitled a party to the relief (*f*). So also, before the statute, a bill to perpetuate testimony was only allowed where some right to *property* was involved (*g*).

Before the statute a mere expectancy or *spes successionis* was not enough.

And there must have been some right to property.

II. There was another species of bill, having a close analogy to that to perpetuate testimony, and often confounded with it, but which, in reality, stood upon different considerations. These were bills to take testimony *de bene esse*, and bills to take the testimony of persons resident abroad, *to be used in suits actually pending in the courts*. There was this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter were, and could be, brought by persons only who were in possession, under their title, and who could not sue at law, and thereby have an opportunity to examine their witnesses in such suit, while bills to take testimony *de bene esse* might be brought, not only by persons in possession, but by persons who were out of possession, in aid of the trial at law. There was also another distinction between them, which was that bills *de bene esse* could be brought only when an action was then depending, and not before (*h*), while bills to perpetuate testimony were only allowed where no action was pending, or could be commenced.

II. Bills to take testimony *de bene esse*.

How distinguished from bills to perpetuate testimony.

(*e*) *Campbell v. Earl of Dalhousie*, L. R. 1 H. L. Sc. App. 462.

(*f*) *Dursley v. Fitzhardinge*, 6 Ves. 251.

(*g*) *Townshend Peerage Case*, 10 Cl. & Fin. 289.

(*h*) St. 1513; *Angell v. Angell*, 1 Sim. & Stu. 83.

Grounds for  
exercising the  
jurisdiction.

The court would make an order for the examination of witnesses *de bene esse*, where important witnesses were so old and infirm that they could not safely travel, or they were in a precarious state of health, or they were abroad at the time of trial,—in short, the court would give permission for such an examination of witnesses wherever the justice of the case appeared to require it (*j*).

The Judica-  
ture Acts,—  
effect of.

The equity jurisdiction, with reference to testimony *de bene esse*, became of considerably less practical importance after the courts of common law were invested with ample powers for that purpose by the statutes 13 Geo. III., c. 63, s. 44, and 1 Will. IV., c. 22, s. 1. But it cannot be said of bills to perpetuate testimony that they have since the Judicature Acts, 1873-75, ceased to be necessary; on the contrary, they appear to remain unaffected by the Judicature Acts, excepting to this trivial extent, that they would now be called actions instead of bills, and might be commenced either at law or in equity; and, of course, in lieu of a bill or action to take evidence *de bene esse*, there could now be a mere order to examine *de bene esse*, obtained (under Order xxxvii. Rule 4) from the court or judge on a summary application in the pending cause or matter; but the grounds or occasions of the jurisdiction are no way altered.



## CHAPTER III.

BILLS *QUIA TIMET* AND BILLS OF PEACE.

I. BILLS *quia timet* were in the nature of writs of I. *Quia timet.*  
 prevention, to accomplish the ends of precautionary  
 justice. The party sought the aid of the court because In order to  
 he feared (*quia timet*) some future probable injury to prevent  
 his rights or interests, and not because an injury had wrongs.  
 already occurred which required compensation or other  
 relief. The nature of the relief given by courts of  
 equity was dependent on circumstances. They inter- Appointment  
 ferred sometimes by the appointment of a receiver of of receivers.  
 rents or other income, sometimes by an order to pay  
 a pecuniary fund into court, sometimes by directing Directing  
 security to be given, or money to be paid over, and security to  
 sometimes by the mere issuing of an injunction, or be given.  
 other remedial process, thus adapting their relief to Granting  
 the precise nature of the particular case and the reme- injunctions.  
 dial justice required by it.

II. Bills of peace bore some resemblance to bills II. Bills of  
*quia timet*. Bills *quia timet*, however, were distin- peace,—how  
 guished from bills of peace in several respects ; because distinguished  
 bills *quia timet* were always used as a preventive pro- from bills  
 cess, before a suit was actually instituted, while bills *quia timet*.  
 of peace, although sometimes brought before any suit  
 was instituted to try a right, were most generally  
 brought after the right had been tried at law.

By a bill of peace was to be understood a bill Bills of peace,  
 brought by a person to establish and perpetuate a right —their object.

which he claimed, and which, from its very nature, might be controverted by different persons, at different times, and by different actions; or where separate attempts had already been unsuccessfully made to overthrow the same right, and justice required that the party should be quieted in the right, if it was already sufficiently established, or if it should be sufficiently established under the direction of the court. The obvious design of such a bill was to secure repose from perpetual litigation, and was founded on that general doctrine of public policy, which, in some form or other, may be found in the jurisprudence of every civilised country, that an end ought to be put to litigation, and above all to hopeless and vexatious litigation (*Interest reipublicæ ut sit finis litium*).

Bills of peace,  
—nature of  
cases for.

One class of cases, to which this remedial process was properly applied, was where there was one general right to be established against a great number of persons. And it might be resorted to either where one person claimed or defended a right against many, or where many claimed or defended a right against one (*a*). Courts of equity having a power to bring all the parties before them, would, in order to prevent multiplicity of suits, at once interpose, and proceed to the ascertainment of the general right; and if it were necessary, they would ascertain it by an action or issue at law, and then make a decree finally binding on all the parties.

Bills of peace,  
—instances of.

Bills of this nature might have been brought by a lord against his tenants to recover an encroachment made under colour of a right of common; by a party interested, to establish his right to a toll due by custom, or to the profits of a fair. So where a party claimed to be in possession of a right of fishing for a consider-

---

(a) *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8.

able distance in a river, and the riparian proprietors set up several adverse rights, he might have a bill of peace against all of them to establish his right and to quiet his possession (b). So in *The Sheffield Water-works v. Yeomans* (c), a bill having been filed against Y. and five other defendants, on behalf of themselves and all other the persons named in certain alleged certificates, praying in effect that the certificates (about 1500 in number, held by different owners) might be declared void, and be delivered up to be cancelled, and new valid certificates issued in lieu thereof, the question as to the validity of these certificates being the only question to be decided in the suit,—it was held that, though the claims of the defendants were not identical, yet, as they all involved the same question of validity, the bill would lie, as being in the nature of a bill of peace.

*Sheffield Waterworks v. Yeomans*,—multitudinous defendants, with identical question of law against e ch.

Another class of cases, and one in which bills of peace were more ordinarily resorted to, was where the plaintiff had, after repeated and satisfactory trials, established his right at law, and yet was in danger of further litigation and obstruction to his right from new attempts to controvert it. Thus, in the case of *Earl of Bath v. Sherwin* (d), where the title to land had been five several times tried in an ejectment, and five several verdicts had been given in favour of the plaintiff, the House of Lords granted a perpetual injunction, upon the ground that it was the only adequate means of suppressing vexatious litigation, the expense and continuance of which was doing irreparable mischief. Courts of equity would not, however, have interfered in such cases before a trial at law, nor until the right had been satisfactorily established at law; latterly,

Where a party has conclusively established a right, and is threatened with fresh litigation.

Ejectment,—repetition of, growing oppressive.

(b) *Mayor of York v. Pilkington*, 1 Atk. 282.

(c) L. R. 2 Ch. 8.

(d) Prec. Ch. 261; 4 Bro. P. C. 373.

however, by Rolt's Act (e), the Court of Chancery might in its discretion either direct an issue to be tried at the assizes or at *nisi prius*, where the circumstances rendered such a course advisable, or might itself decide the question of law or fact.

No perpetual injunction in favour of a private right in contravention of a public right.

It seems that courts of equity would not, upon a bill of this nature, decree a perpetual injunction for the establishment of the right of a party who claimed in contravention of a public right, as if he claimed an exclusive right to a highway, or to a common navigable river; for it was said, that would be to enjoin all the people of the state or country. But the true principle was, that courts of equity would not, in such cases, upon principles of public policy, intercept the assertion of public rights, and that in fact the right claimed was impossible in law.

Judicature Acts,—effect of.

It does not appear that bills *quia timet* are in the slightest degree affected by the Judicature Acts, 1873-75, or the rules thereunder, excepting to this merely nominal extent, that they would now be called actions in the nature of bills *quia timet*; and while the equity jurisdiction remains, it is now shared in by the Common Law divisions. The like remarks apply also to bills of peace.

---

(e) 25 & 26 Vict. c. 42, s. 2.

## CHAPTER IV.

## CANCELLING AND DELIVERY UP OF DOCUMENTS.

THE Court of Chancery frequently cancelled, or rescinded, or ordered to be delivered up, instruments of a distressful or obnoxious character, and that whether they were voidable, or were in fact void. The jurisdiction exercised in cases of this sort was founded upon the administration of a protective or preventive justice, in analogy to the principle *quia timet*, that is, for fear that such instruments might afterwards be vexatiously or injuriously used, when the evidence to impeach them was lost, or that they might be already clouding the title or interest of the party (a).

Instrument ordered to be delivered up—when?

Upon such an application to the court, it was not a matter of absolute right in the plaintiff, but it was a matter of judicial discretion for the court, to grant or to refuse the relief prayed, according to its own notion of what was proper. Thus, a court of equity would sometimes refuse to decree specific performance of an agreement, and, at the same time, might decline to order the agreement to be delivered up, cancelled, or rescinded; and, again, the court might order an agreement to be rescinded or cancelled upon the application of the one party, and yet decline to interfere at the instance of the other.

Granting of such a decree not a matter of right, but of judicial discretion in the court.

---

(a) *Cooper v. Joel*, 27 Beav. 313; *Williams v. Bull*, 32 Beav. 574; *Onions v. Cohen*, 2 H. & M. 354; *Peake v. Highfield*, 1 Russ. 559.

Voluntary deed or agreement, not ordinarily relieved against.

For example, voluntary agreements, although free from fraud, were not enforceable in a court of equity, and yet they would not ordinarily be set aside by the court, being free from fraud. If a man would improvidently bind himself in a voluntary deed, and not reserve a liberty to himself by a power of revocation, a court of equity, as was quaintly stated in an old case, would not loose the fetters he had put on himself, but would leave him to lie down under his own folly (*b*). And this doctrine has never been narrowed by the later decisions, the absence of a power of revocation in a voluntary deed not throwing upon the person seeking to uphold the deed the onus of proving in the first instance that such a power was intentionally excluded by the donor (*c*).

If court granted relief, it did so on terms.

And even in those cases in which the court would grant relief, it imposed such terms as it thought fit upon the plaintiff, upon the maxim, he who seeks equity must do equity; and if he refused to comply with such terms, his bill was dismissed.

Where plaintiff had good defence to an instrument in equity, though not at law.

A party had a right to come into equity to have agreements, deeds, or securities cancelled, rescinded, or delivered up, where he had a defence to them good in equity, but not capable of being made available at law.

I. Voidable instruments, — (a.) When cancelled.

Courts of equity would also, in general, set aside and cancel agreements and securities which were voidable merely, and not void, under the following circumstances :—

Four groups of cases.

1. Where there was some actual fraud in the party defendant, in which the party plaintiff had not participated.

(*b*) See *Villers v. Beaumont*, 1 Vern. 101; *Bill v. Cureton*, 2 My. & K. 503; *Petre v. Espinasse*, 2 My. & K. 496.

(*c*) *Hall v. Hall*, L. R. 8 Ch. App. 430; and distinguish *Coutts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44.

2. Where there was some constructive fraud against public policy, and the party plaintiff had not participated therein.

3. Where there was some constructive fraud against public policy, and although the party plaintiff had participated therein, yet public policy would have been defeated by allowing the instrument to stand.

4. Where there was some constructive fraud in both parties, but they were not both of them *in pari delicto*.

The first two of these four groups of cases occasioned little difficulty to the court; it was manifestly a dictate of natural justice, that a party ought not to be permitted to avail himself of an instrument procured by his own actual or constructive fraud, to the prejudice of a third person not a party to the fraud.

Illustrations  
of the four  
groups.

The third group of cases comprised, *e.g.*, gaming securities, which would be decreed to be delivered up, notwithstanding both parties had participated in the fraud, because public policy would be best served by such a course (*d*).

The fourth group of cases comprised, *e.g.*, cases in which the party seeking relief had acted under circumstances of oppression, imposition, hardship, or other undue influence, arising either from a great inequality between the ages or conditions of the respective parties, or from some other like occasion.

On the other hand, where the party seeking relief was the sole guilty party, or where he had participated equally and deliberately in the fraud, or where the

1. *Voidable instruments*  
(continued).—  
(b.) When not cancelled.

(*d*) *Earl of Milltown v. Stewart*, 3 Mylne & Craig, 18; *W— v. B—*, 32 Beav. 574; *Quarrier v. Colston*, 1 Phillips, Ch. R. 147.

agreement which he wanted to set aside was founded on illegality, immorality, or some base or unconscionable conduct on his own part; in such cases, courts of equity would leave him to the consequences of his own iniquity, and would decline to assist him to escape from the toils which he had studiously prepared for others, or whereby he had sought to violate with impunity the interests or the morals of society (*e*).

II. *Void instruments,—difficulty with.*

Questions often occurred how far courts of equity would or ought to interfere to direct instruments to be delivered up and cancelled, which were utterly void, and not merely voidable. The doubt, in the first place was, whether, the instrument being utterly void and incapable of being enforced even at law, the remedial justice of courts of law to protect the party was not adequate and complete, and therefore obviated the necessity of the interposition of courts of equity; and, in the next place, the doubt was, whether the more appropriate remedy would not be the granting a perpetual injunction to restrain the use of the instrument (*f*).

(*a.*) When delivered up, and upon what grounds.

But whatever the doubts and difficulties formerly entertained upon this subject, they were put to rest by the more modern decisions, and the jurisdiction of equity to order a delivery up of void documents was in these same decisions fully established, in all cases in which the delivery up of the document might help to prevent the perpetration of some further wrong (*g*).

The jurisdiction in these cases was founded on the principle of equity that it was better to prevent than to relieve. If an instrument was of such turpitude that it ought not to be used or enforced, it was against

(*e*) *Franco v. Bolton*, 3 Ves. Jr. 386, 372; *St. John v. St. John*, 11 Ves. 535, 536; *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

(*f*) *Hilton v. Barrow*, 1 Ves. Jr. 284; *Ryan v. Mackmath*, 3 Bro. C. C. 15, 16.

(*g*) Mr. Swanston's note to *Davis v. Duke of Marlborough*, 2 Swans. 157.



conscience for the party holding it to retain it, since he could only retain it for some sinister purpose. If it was a negotiable instrument, it might also have been used for a fraudulent or improper purpose to the injury of some one or other. If it was a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily had a tendency to throw a cloud upon the title. If it was a written agreement, solemn or otherwise, while it existed it was always liable to be applied to improper purposes, and it might be vexatiously litigated at a distance of time, when the proper evidence to repel the claim might have been lost or obscured (*h*).

But where the illegality of the agreement, deed, or other instrument appeared upon the face of it, so that its nullity could admit of no doubt, and its capacity therefore to be made the means of perpetrating some further wrong was wholly paralysed, there was not the same reason for the interference of a court of equity, to direct it to be cancelled or delivered up. In such a case there could be no danger that the lapse of time would deprive the party of his full means of defence; nor could such a paper throw a cloud upon any title, or diminish any one's security, or be used as a means of vexatious litigation, or for any other or sensible injury. And, accordingly, it was fully established that in such cases courts of equity would not interpose their authority to order the delivery up of the void instrument (*i*).

Have the Judicature Acts, 1873-75, in any material respect altered the jurisdiction in equity as regards

(*b*.) When not delivered up, and upon what grounds.

Judicature Acts,—effect of.

---

(*h*) *Bromley v. Holland*, 7 Ves. 20, 21; *Kemp v. Prior*, Ves. 248, 249.

(*i*) *Simpson v. Lord Howden*, 3 Mylne & Cr. 97; *Bromley v. Holland*, 7 Ves. 16; *Threfall v. Lunt*, 7 Sim. 627; *Hurd v. Bilinton*, 6 Gr. 145.

the cancellation of voidable and the delivery up of void instruments? Every ground of defence and every variety of relief and of protection and prevention being now equally available in, and equally procurable from, all the divisions of the High Court of Justice, as well the Common Law as the Chancery Divisions, it is clear that the jurisdiction in equity in such matters, so far as it survives, is no longer either *exclusive* or *auxiliary*, but is strictly speaking *concurrent*, although (for reasons of convenience) it is by the Judicature Act, 1873 (*j*), assigned to the Chancery Division as portion of its *exclusive* jurisdiction; but the grounds of the jurisdiction in equity do not appear to be otherwise materially altered.

---

(*j*) Sect. 34, sub-sect. 3.

## CHAPTER V.

## BILLS TO ESTABLISH WILLS.

ALTHOUGH courts of equity had no general jurisdiction over wills, the proper court having been as regards personality the Ecclesiastical Court, and latterly the Court of Probate its successor (a), and as regards realty the Court of Common Pleas or of the Queen's Bench, and latterly (upon citation of the heir and devisee) the Court of Probate (b), yet whenever a will came incidentally into question before courts of equity, as when these courts were called upon to execute the trusts of the will, they necessarily acquired some *jurisdiction* regarding wills (c). In such a case, if the validity of the will was admitted, or already established elsewhere, the courts of equity acted upon it to the fullest extent; but if the parties did not admit the validity of the will, and the same had not been established elsewhere, the court of equity in which the cause was depending would have caused the validity of the will to be established, and for that purpose would either have directed an issue or issues to be tried at the assizes, and upon the finding, or ultimate finding, would have declared the will established, or would itself have tried the question and established the will on its own finding, which latter course was called proving the will in Chancery *per testes* (d); and if the will

Court of Probate.  
Equity dealt with wills incidentally.

(a) 20 & 21 Vict. c. 77, ss. 61, 62.

(b) *Ibid.*

(c) *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 630.

(d) See also Rolt's Act, 25 & 26 Vict. c. 42.

were once established, a perpetual injunction would have been decreed against the heir.

Devisee might come into equity to establish a will against heir-at-law.

But further, it was often the principal object of a suit in equity, as when brought by devisees, to establish the validity of the will, being a will of real estate, and to obtain thereupon a perpetual injunction against the heir-at-law, to prevent him from contesting its validity in future (e). In such cases the jurisdiction exercised by courts of equity was analogous to that exercised in cases of bills *quia timet*, and was founded upon the like considerations, in order to give security and repose to titles, while the evidence for them was abundant. And their jurisdiction was assumed because the devisee had no power to actively litigate the validity of the will at law, but was obliged to wait until the heir-at-law commenced an ejectment at law, which action the heir might indeed commence at once, but might also put off until the evidence in support of the will was grown obscure.

Even though the heir-at-law had brought no ejectment.

Accordingly, in the case of *Boyse v. Rossborough* (f), it was decided that a devisee in possession was entitled to have the will established against the heir-at-law of the testator, although the heir had brought no action of ejectment against the devisee, although no trusts were declared by the will, and although it was not necessary to administer the estate under the direction of the Court of Chancery. And it was further determined, that the Court of Chancery had power to establish a will against parties claiming under a prior will, and disputing the plaintiff's claim, a devisee being entitled to have the will established, and his title quieted

Devisee might establish a will against all setting up an adverse right.

(e) *Bootle v. Blundell*, 19 Ves. 494, 509.

(f) *Kay*, 71; 1 K. & J. 124; 3 De G. M. & G. 817; 6 H. L. Cas. 1.

not only as against the heir but against all persons setting up adverse rights (*g*).

But, on the other hand, the heir-at-law could not come into a court of equity excepting by consent of the devisee to have the validity of the will tried. He could not come into equity unless with such consent, because he had a legal remedy by ejectment: if there were any impediments to the proper trial of the merits of such an ejectment, he might have come into equity to have them removed, *e.g.*, upon a bill for discovery (*h*). And latterly, on a bill by an heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the court might, under Rolt's Act (*i*), s. 2, have determined the question itself, or in its discretion might have directed an issue to be tried at law, and in these cases the heir was entitled as of right to a trial by jury (*j*).

The facilities of proving a will in the Probate Division are now very great. When the will has the usual attestation clause, it is proved by the simple oath of the executor, that he believes the will to be the true last will; but when the will has not that attestation clause, then in addition to the executor's oath to the effect aforesaid, there is required also from one of the subscribing witnesses an affidavit of due execution by the testator; and probate in either of these forms is called probate in common form. Probate in solemn form is where both the attesting witnesses are sworn and examined, and other corroborative evidence is taken, in the presence of the widow and next of kin, including the heir. When the will has once been proved in solemn form, the probate is

The heir-at-law could only come into equity by consent.

Proof of will in Court of Probate,—effect of:

(*i*.) When will is proved in solemn form:

(*g*) *Lovett v. Lovett*, 3 K. & J. 1.

(*h*) Sm. Man. 409.

(*i*) 25 & 26 Vict. c. 42.

(*j*) Dan. Ch. Prac. 938, 945; *Bunks v. Goodfellow*, 40 L. J. Ch. 511.

(2.) When will  
is proved in  
common form.

not only sufficient but conclusive proof of the will (*k*); but when the probate has been in common form, and in some subsequent action affecting real estate it is necessary to establish the devise, the plaintiff gives to the defendant ten days at least before the trial notice that he intends using at the trial the probate, and thereupon such probate becomes sufficient evidence, unless the defendant within four days after receiving the notice gives a counter-notice to the effect that he disputes the devise (*l*); and in that latter case, it would be necessary to prove the will as a substantive independent fact, in accordance with the ordinary rules of evidence.

*Allen v.*  
*M'Pherson*,  
the facts of,  
and decision  
in.

In connection with the jurisdiction in equity to establish wills, and the facilities that are now afforded in the Court of Probate in proving a will, reference should be made to the two cases of *Allen v. M'Pherson* (*m*), and *Meluish v. Milton* (*n*). In the former of these two cases, it appeared that a testator by his will and certain codicils thereto gave R. A. large bequests, and by a final codicil revoked all these bequests and substituted for them a small weekly allowance for R. A.'s life only. The will and all the codicils were admitted to probate in the Ecclesiastical Court (being the then Court of Probate). Subsequently to such probate, R. A. filed his bill in the Court of Chancery, alleging that the testator had executed the last codicil under the undue influence of the residuary legatee, who had falsely represented R. A.'s character to the testator, and further alleging that it had not been open to him in the Ecclesiastical Court to take objection to the validity of such codicil on that ground, and praying that the residuary legatee might be declared a trustee for R. A. to the extent of the revoked bequests. But it was

(*k*) 20 & 21 Vict. c. 77, s. 62.  
(*m*) 1 H. L. Ca. 191.

(*l*) 20 & 21 Vict. c. 77, s. 64.  
(*n*) L. R. 3 Ch. Div. 27.

held, that the Court of Chancery had no jurisdiction in the matter.

And in the case of *Meluish v. Milton*, *supra*, it appeared that the testator made a will giving all his property to the defendant (whom he described as his wife), and also appointing her sole executrix. She proved the will in the Court of Probate. The heir-at-law and sole next of kin of the testator subsequently filed his bill against the defendant, alleging that the defendant was not the testator's lawful wife, and that she had obtained the property by fraudulently deceiving the testator on that head, and praying that she might be declared a trustee of the property for him. But the court (James, Mellish, and Baggalay, L. J.J.) held that the Court of Chancery had no jurisdiction to entertain the case, which was exclusively within the jurisdiction of the Court of Probate.

The two last-mentioned cases appear to be conclusive against the jurisdiction of the Chancery Division of the High Court, as regards wills and codicils dealing with personal estate (with or without real estate), or containing even an appointment of an executor, although not otherwise purporting to deal with personal estate: in all these cases, the Court of Probate has jurisdiction. But that court has no jurisdiction, ever since the Judicature Acts, 1873-75 (o), in the matter of wills not dealing with personal estate and not containing any appointment of executors, but dealing with real estate only: Consequently, in the case of a will of real estate only, the rule contained in *Boyse v. Rossborough*, *supra*, would appear still to hold good, and not to be affected by the cases of *Allen v. M'Pherson*, and *Meluish v. Milton*, *supra*, so that in this case the

*Meluish v. Milton*, the facts of, and decision in.

The present jurisdiction of the equity division.

---

(o) See Act 1873, s. 34. and Act 1875, s. 11, sub-sect. 3.

Chancery Division of the High Court would still have jurisdiction to establish wills; and in a very recent case (*p*), Jessell, M.R., said that a judge of the Chancery Division (or, in fact, of any Division) of the High Court had, under the Judicature Acts, jurisdiction to grant probate, but that (for the reasons there stated) it would not be using a sound discretion to exercise the jurisdiction (*q*).

---

(*p*) *Pinney v. Hunt*, L. R. 6 Ch. Div. 98.

(*q*) L. R. 6 Ch. Div. 101.



## CHAPTER VI.

## “ NE EXEAT REGNO.”

THE writ of *ne exeat regno* was a prerogative writ, which issued, as its name imports, to prevent a person from leaving the realm; in its origin, it was only applied to great political objects and purposes of state, for the safety and benefit of the realm; and such having been the character of its origin, it is at the present day applied in favour of the subject and his private rights with great caution and jealousy.

In general, it may be stated, that the writ of *ne exeat regno* would not be granted unless in cases of equitable debts and claims, in respect of which it was in the nature of equitable bail. If therefore the debt was one demandable at law, the writ would be refused; for in such a case the remedy at law was open to the party.

However, to the general rule, that the writ of *ne exeat regno* lay only in respect of equitable debts and claims, there were two recognised exceptions, that is to say,—

1. Where alimony had been decreed to a wife, it would be enforced against a husband by a writ of *ne exeat regno*, if he was about to quit the realm. But the alimony must have been actually decreed; for if the case was still pending, courts of equity would not have granted the writ.

To prevent a person leaving the realm.

General rule, — granted only in cases of equitable debts.

Two exceptions, —

1. In cases of alimony decreed, where husband intends leaving the jurisdiction.

2. In cases where there is an admitted balance, but plaintiff claims a larger sum.

2. Where there was an admitted balance due by the defendant to the plaintiff, but a larger sum was claimed by the plaintiff, the writ would be issued, for there was not in such a case any real deviation from the appropriate jurisdiction of courts of equity, matters of account having been properly cognisable therein (a).

The debt must be certain in its nature.

As to the nature of the equitable demand for which a writ of *ne exeat regno* would be issued, it must have been certain as to its nature, and actually payable, and not contingent. It should also have been for some debt or pecuniary demand. The writ would not be issued, therefore, in a case where the demand was of a general unliquidated nature, or was in the nature of damages.

Judicature Acts,—effect of.

The Judicature Acts, 1873–75, do not appear to have in any respect altered the equitable jurisdiction in respect of the writ *ne exeat regno*; although it may be a question, whether the writ would not now issue for legal as well as for equitable debts (b), assuming that the other circumstances of the case were proper for the exercise by the court of this jurisdiction.

A writ of *ne exeat regno* may also issue summarily under the Absconding Debtors' Act, 1870 (c), where the debtor is going abroad after the issue of a debtor's summons against him under the Bankruptcy Act, 1869 (d).

---

(a) *Sobey v. Sobey*, L. R. 15 Eq. 200.

(b) Judicature Act, 1873, s. 24, sub-sect. 7.

(c) 33 & 34 Vict. c. 76.

(d) *Lees v. Patterson*, 7 Ch. Div. 866. See also Debtors' Act, 1869, s. 6.

## BOOK II.

---

# THE PRACTICE IN EQUITY.

---

### SECTIONS 1-4.

THE COURTS (SUPERIOR AND INFERIOR, ORIGINAL AND APPELLATE) HAVING JURISDICTION IN EQUITY,—ALSO, THE JURISDICTION THEREOF.

§ 1. *The Chancery Division.*—*The Courts Original and Appellate.*—Firstly, there is the High Court, consisting of the Rolls Court, the Courts of the three Vice-Chancellors (each of these four Courts having chambers attached to it), and the Court of the Additional Judge (Fry, J.), appointed under the Supreme Court of Judicature Act, 1877 (40 Vict., c. 9), but having no chambers attached to it. [The three Common Law Divisions, namely, the Queen's Bench, Common Pleas, and Exchequer Divisions, have also full jurisdiction in Equity, but (for reasons of convenience) do not choose to exercise that jurisdiction excepting where and so far as equitable matters arise incidentally in the course of the proper jurisdiction of these several divisions.]

Secondly, there is the Court of Appeal, consisting of the Lords Justices, three of them, at the least, being required upon all appeals from judgments (final or interlocutory), and two of them, at the least, in all appeals from interlocutory orders (Act 1876,\* § 12),

---

\* Act 1873, means the Judicature Act, 1873 ; Act 1875, means the

There are usually two divisions of this Court sitting, one at Lincoln's Inn for matters arising in the Chancery Division (and in the Probate Division), [and one at Westminster for matters arising in the Common Law Divisions]. The Court of Appeal has only appellate jurisdiction, but may exercise such original jurisdiction as is incidental thereto (Act 1873, § 19; *Wilson v. Church*, 11 Ch. Div. 576; *British Dynamite Company v. Krebs*, 11 Ch. Div. 448).

Thirdly, there is the House of Lords, to which an appeal lies from every judgment (whether final or interlocutory), and also from every interlocutory order of the Court of Appeal in Chancery (*Walsall Overseers v. L. & N. W. Railway Co.*, 4 App. Cases, 30).

§ 2. *The Chancery Division.—General Jurisdiction of.*—The matters assigned (and, in effect, *exclusively* assigned) to the Chancery Division of the High Court (Act 1873, § 34) are the following:—

- (1.) All causes and matters (other than appeals from County Courts), which, by any particular or general statute, have been, or shall be, *exclusively* assigned to that Division; and
- (2.) All causes and matters connected with the following matters, namely:—
  - (a) Administration of Estates;
  - (b) Partnerships,—Dissolution and Accounts;
  - (c) Mortgages,—Redemption and Foreclosure;
  - (d) Portions and other Charges on Land,—Raising of;

---

Judicature Act, 1875; Act 1876, means the Appellate Jurisdiction Act, 1876; and Act 1877, means the Judicature Act, 1877; also, Roman numerals denote the number of *Order*, and Arabic numerals denote the number of *Rule*, the Orders and Rules of the Supreme Court being (for the sake of brevity) so denoted throughout this Epitome of Practice. Matter stated within *square brackets*, thus [ ], appertains mostly to the Common Law Divisions.

- (e) Liens and Charges on Property,—Sale of such Property, and distribution of proceeds of sale;
- (f) Trusts (Public or Private),—Execution of ;
- (g) Deeds and other Instruments,—Cancellation, or Setting aside, or Rectification thereof ;
- (h) Sales and Leases, Contracts for—Specific Performance of ;
- (i) Real Estate,—Partition and Sale of ;
- (k) Infants, — Custody of their Persons and Estates (Act 1873, § 34) ; and (practically)
- (l) Lunatics so found by inquisition (Act 1875, § 7) ; besides, also—
- (m) Lunatics not so found (*Vane v. Vane*, 2 Ch. Div. 124 ; and see *Ex parte Cahen, In re Cahen*, 10 Ch. Div. 183) ; and besides also—
- (n) Married Women,—in all the intricate questions relating to their property, whether settled to their separate use or not.

And the Chancery Division has also *concurrent* jurisdiction in every matter or thing (of a CIVIL character) in which the Common Law Divisions have jurisdiction,—e.g., a matter of account, however simple, is now the subject of equitable jurisdiction, and even, *semble*, an injunction may be granted to restrain the publication of a libel (*Hinrichs v. Berndes*, W. N., 1878, p. 11), *sed quære*.

[Similarly, in the Common Law Divisions, the Q. B. Division has still exclusive jurisdiction in all causes and matters civil and criminal which would have fallen exclusively to the Court of Q. B. if the Judicature Act had not been passed (Act 1873, § 34: *Re Ellershaw, Ex parte Longbottom*, 1 Q. B. Div. 481 ; and see *Glossop v. Heston and Isleworth Local Board*, 12 Ch. Div. 102) ; similarly, the C. P. Division and the Exchequer Division (Act 1873, § 34) ; and similarly, the Probate Division (Act 1873, § 34 ; Act 1875, § 11),—but in every case,

subject to the more general provisions of the Judicature Acts, under which every division has all the jurisdiction of every other.]

§ 3. *Divisional Courts.*—*Matters for.*—The various business for these courts may be classified as under:—

- (1.) All appeals (from Petty or Quarter Sessions) from a County Court, or from any other Inferior Court, which, before the Judicature Acts, 1873–5, lay to the Superior Courts of Law or Equity (Act 1875, § 45; lvii. a, 1);
- (2.) Cases, or points in cases, reserved at trials for the consideration of the Divisional Court, and cases or points in cases directed at trials to be argued before the Divisional Court (Act 1873, § 46);
- (3.) Applications for New Trials, from a trial before a Judge *with* a Jury (xxxix. 1; lvii. a, 1, Dec. 1876); and also applications for New Trials from a trial in the County Court, even without a jury (*London v. Roffey*, 3 Q. B. Div. 6; *Davis v. Godbehere*, 4 Exch. Div. 215);
- (4.) Applications for orders charging stock or shares (xlvi. 1); and
- (5.) The following civil (besides certain election and criminal) proceedings, viz.:—
  - (a) Proceedings directed by Act of Parliament to be taken before the Court, when the Court's decision is final;
  - (b) Cases stated by the Railway Commissioners;
  - (c) Special cases, by agreement of all parties; and
  - (d) Appeals from the Common Law Chambers to the Court (lvii. a, 1).

There are very few matters in equity that go to Divisional Courts, and when any such arise they are taken to the Divisional Court sitting at Westminster; *e.g.*,

applications for New Trials, when trial before judge *with* a jury; also, equity appeals from County Courts (*Hunt v. City of London Real Property Co.*, 2 Q. B. Div. 605; 3 Q. B. Div. 19; *Clarke v. Roche*, 3 Q. B. Div. 170).

Appeals (where they lie) from a Divisional Court are to the Court of Appeal, and thence to the House of Lords.

§ 4. *Inferior Courts (including County Courts),—General Jurisdiction of.*—Every inferior court having jurisdiction in equity, or in both law and equity, is to grant (in all proceedings before it) such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and is also to grant such or the like effect to every ground of defence or counter-claim, equitable or legal, in as full a manner as the High Court may and ought to grant (Act 1873, § 89); *c.g.*, it may issue an injunction, and also commit or attach for breach of the injunction (*Reg. v. Harington*, W. N., 1879, p. 14; *Ex parte Martin*, 4 Q. B. Div. 212; *Martin v. Bannister*, 4 Q. B. Div. 491); subject to this one exception or limitation, *viz.*, that where the defence or counter-claim involves matter beyond the jurisdiction of such inferior court, no relief is to be given thereon beyond the limit of the jurisdiction of the inferior court (Act 1873, § 90; *Davis v. Flagstaff Silver Mining Co.*, 3 C. P. Div. 228); but such limited relief may be given, or the entire action may (on the application of either party) be transferred into the High Court (Act 1873, § 90). As regards removal of action generally from County Court into High Court, see 28 and 29 Vict., c. 99, for Chancery matters [and 19 and 20 Vict., c. 108, for Common Law matters]; and conversely, as regards removal of action generally from High Court into County Court, see 30 and 31 Vict., c. 142, § 7, for Chancery and Common Law matters equally; and see *Osborne v. Homburg*,

1 Exch. Div. 48; *Foster v. Underwood*, 3 Exch. Div. 1; *Welpby v. Bull*, 3 Q. B. Div. 80, 253; and distinguish *Insley v. Jones*, 4 Exch. Div. 16.

The appeal from an inferior court (including the Lord Mayor's Court, *Appleford v. Judkins*, 3 C. P. Div. 489, overruling *Le Blanch v. Reuter's Telegraph Co.*, 1 Exch. Div. 408) is to a divisional court of the High Court, and the decision of such divisional court is usually final (Act 1873, § 45), but may (with the leave of the divisional court) be appealed to the Court of Appeal (Act 1873, § 45). And in the case of an action remitted from the High Court to the County Court, a New Trial is to be moved for in a divisional court, even when trial has been without a jury (*London v. Roffey*, 3 Q. B. Div. 6; *Davis v. Godbehere*, 4 Exch. Div. 215).

#### SECTION 5.

#### THE FORMAL PROCEDURE AND THE SUMMARY PROCEDURE DISTINGUISHED.

The *formal* procedure is the regular *de cursu* procedure in an action properly so called, commencing with a writ (i. 1), and proceeding successively to statement of claim and statement of defence, with or without a reply or other subsequent pleadings, and thereafter to argument or (as the case may require) to trial and argument both, and to judgment or (as the case may be) to verdict and judgment both, followed up with satisfaction of the judgment. The particular steps of this *de cursu* procedure are successively detailed hereunder. It is conceivable, although it rarely happens, that nothing but the formal procedure should be used in an action; more often, however, and in fact almost always, many incidental proceedings intervene in the progress of every action from its commencement to its conclusion, such incidental proceedings being necessitated by various occasions arising in the action, and



being disposed of in an expeditious and less formal or informal manner, whence these latter proceedings of an occasional and *prout res exigit* character are commonly designated and classified together as the *summary* procedure in the action. The particular occasions for the exercise of the summary procedure are indicated hereunder, and in general at the particular stages at which they respectively arise in the action.

Besides the summary jurisdiction in an action, the Chancery Division of the High Court exercises also a large summary jurisdiction, upon petition, motion, and summons, independently of the pendency of any action, and solely by virtue of certain statutory provisions in that behalf; and sometimes by reason merely of the Court having seisin of the subject-matter, *e.g.*, where money has been paid into Court under the Act for the Relief of Trustees (*In re Slater's Trusts*, 11 Ch. Div. 227). This particular summary or statutory jurisdiction is wholly excluded from this epitome of the "Practice in Equity," but it will be found very conveniently stated in Morgan's *Chancery Acts and Orders*, 4th and 5th editions. [Similarly, the Common Law Divisions exercise a like large summary jurisdiction under the provisions of particular statutes, and sometimes by force merely of the original jurisdiction vested in them before the Judicature Acts; that summary jurisdiction is wholly excluded from this epitome, but will be found in Chitty's *Archbold's Practice of the Q. B.*, *C. P.*, and *Exchequer*, 13th edition.]

## SECTIONS 6-16.

### THE WRIT OF SUMMONS—THE *FORMAL* PROCEDURE, WITH THE *SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 6. *The Writ of Summons.*—*Preparation and Issue of.*—Having procured an ordinary form of writ at the

law stationer's, fill up same with (among other matters which the form itself suggests) the names of the parties on the face of it, and an indication of the plaintiff's claim on the back of it, which indication of claim is called the plaintiff's indorsement of claim ; and further, there must be an indorsement of the plaintiff's address for service—such address being his own or his solicitor's office, if that is within three miles of Temple Bar, or else some other specified place within that limit ; and in addition thereto (but only when the solicitor is a mere agent of another solicitor), there must be an indorsement of the principal solicitor's name and place of business (iv. 1, 2). These three matters, viz., the selection of the parties, the indorsement of claim, and the indorsement of the address or addresses, having been done, the writ is then taken (in the case of Chancery matters) to the Record and Writ Clerk's Office Chancery,\* [and (in the case of Common Law matters) to the Queen's Bench, Common Pleas, or Exchequer Division Office, as the case may be] ; and upon payment of ten shillings, an adhesive stamp for that amount is affixed to the writ (on the face of it, left hand, near top), and the seal of the office is then impressed upon the writ (on the face of it, left hand near foot), and all (if any) erasures, cancellings, or interlineations on the writ are at the same time marked with a smaller seal impressed, each of them being marked separately. So soon as the writ is so impressed

---

\* The writ of summons in any Chancery [or Common Law] action may be issued out of any District Registry ; and if the defendant resides or trades within the district selected by plaintiff, then the writ is to direct defendant to enter his appearance in the same Registry ; but if defendant neither resides nor trades there, then the writ is to mention that the defendant may enter his appearance either in London or in the District Registry (v. 1-3). The plaintiff's "address for service" (*e.g.*, of defendant's notice of appearance to writ of summons) is to be specified on the writ,—being his own or his solicitor's office if that is within the district, or else some other specified place within the district, and in addition thereto (but only when the defendant neither resides nor trades within the district) an address in London not more than three miles from Temple Bar (iv. 3a ; *Smith v. Dobbin*, 3 Exch. Div. 338).

with the seal of the office, it is said to be issued (v. 6). The writ is tested (*i.e.*, witnessed) in the name of the Lord Chancellor or (but only in the case of there being no Lord Chancellor) in the name of the Lord Chief Justice of England, and bears date the day of issue (ii. 8). And the plaintiff marks on the writ the division to which he assigns his action, and (in the Chancery Division) the name of the judge to whom he assigns same (Act 1875, § 11, sub-sects. 1, 2, 3 ; v. 4). The plaintiff takes the sealed writ (and which is called the original writ) and leaves a copy of same at the office ; and the copy so left is filed in the office, and an entry of the filing is made in the cause-book, and the action is distinguished by the date of the current year of filing, a letter (being the first letter of the plaintiff's surname) and a number (being the number which denotes the order of the particular writ among all the writs entered under the same letter in the same year). This year, letter, and number are marked on the original writ, and on all copies thereof, and on all subsequent documents in the action, on the first page of every such document (right hand, near top).\*

§ 7. *The Writ of Summons.*—*Indorsement of Claim upon.*—The writ of summons, as already stated, is to be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action (ii. 1) ; but in such indorsement, it is not essential to set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled (iii. 2) ; and accordingly, as we shall see (§ 12) the indorsement may be amended so as to extend to any other cause of action or any additional

---

\* Where the writ issues out of the District Registry, the like steps are gone through ; and the name of the particular District Registry is to be specified on the face of the writ (left hand, near top, between, in Chancery matters, Chancery Division and name of particular judges, and, in Common Law matters, immediately under the name of the Division).

remedy or relief (*Colebourne v. Colebourne*, L. R. 1 Ch. D. 690). If the plaintiff sues, or a defendant is sued, in a representative capacity, the indorsement of claim is to show it (iii. 4). In all cases of ordinary account (*e.g.*, a partnership, executorship, or ordinary trust account), if the plaintiff desires an account in the first instance, the indorsement of claim is to ask expressly for such account (iii. 8); [also, in all actions where the claim is for a debt or liquidated demand in money with or without interest, the indorsement of claim should be special, that is, should specify the particulars of the amount claimed (iii. 6); and should also include a sum for costs specified separately from the other particulars (iii. 7), and should mention that upon payment of the specified debt and specified costs all further proceedings will be stayed].

§ 8. *The Writ of Summons.*—*Service of.*—So soon as the writ is issued, the plaintiff should in general serve same on the defendant or defendants at once. This service is personal, that is, copy of writ must be put into defendant's hands or left in his presence with (in the latter case) a verbal intimation to him that the slip of paper is a copy of writ; and the plaintiff must also show the original writ to the defendant, but, *semble*, only if he desires to see it (*Goggs v. Huntingtower*, 12 M. & W. 503; ix. 2). The person serving the writ should immediately (and within three days at the most), after service, indorse on the original writ the day of the month and week of the service (ix. 13).

Where husband and wife are co-defendants, service on the husband is also service on the wife (ix. 3).

Where the defendant is an infant, the service is *prima facie* good if effected on his or her father or guardian, or (if none) then on the person with whom

the infant resides, or under whose care he or she is (ix. 4).

Where the defendant is a lunatic so found by inquisition, service on his or her committee is good service, and if there has been an inquisition, but as yet no committee either of the person or of the estate of the lunatic has been appointed, the court will upon motion direct service usually upon the keeper of the asylum, or other the person with whom the lunatic is residing (*Thorn v. Smith*, W. N. 1879, p. 81); and when a defendant of unsound mind has not yet been found so by inquisition, the service is *prima facie* good if effected on the person with whom he or she resides, or under whose care he or she is (ix. 5).

Where the defendants are partners, and are described by the partnership name (and not by their individual names), service of the writ is good if effected personally upon any one or more of them, or if effected at the office (if only one), or at the principal office (if more than one), of the partnership, within the jurisdiction, upon the person having at the time of service the control or management of the business there (ix. 6); and the like rule applies where an ostensible partnership consisting, in fact, of but one person is made a defendant by the ostensible partnership name, and not by his or her own individual name (ix. 6*a*).

Where defendant is in legal possession of premises which the plaintiff claims to recover, and the plaintiff cannot effect personal service on the defendant, and the premises are vacant, service is good if a copy of the writ is posted upon the door of the premises, if a dwelling-house, or upon some other conspicuous part of the premises, not being a dwelling-house (ix. 8).

§ 9. *The Writ of Summons.—Leave to issue.*—In case the defendant, or any one or more of the defendants,

is or are out of the jurisdiction, and it is intended to serve the writ there, or to give notice of it there, the leave of the court or of a judge must first be obtained before the writ or summons can be sealed (*i.e.*, issued) at all (ii. 4). Such leave may be obtained upon motion in court, supported by an affidavit entitled in the action that is to be, and in the matter of the Judicature Acts (*Young v. Brassey*, L. R. 1 Ch. D. 277); however, by direction of the Master of the Rolls (Jessell, M.R.), and which direction has been substantially adopted by the several Vice-Chancellors, the unsealed writ is to be left at chambers, with an office copy of the affidavit (if any affidavit necessary), and the judge's leave to issue the writ is then written on the unsealed writ. The title of the affidavit (if any affidavit necessary) is not altered by the direction.

N.B.—It is sometimes necessary before commencing an action to obtain leave to do so; *e.g.*, after a first action involving substantially the same questions as the second proposed action, for in such a case the practice in use prior to the Judicature Acts, 1873-5, remains in force (*Laming v. Gee*, 10 Ch. Div. 715).

§ 10. *The Writ of Summons.*—*Leave to make Substituted Service of, or to give Notice in lieu of Service of.*—Where personal service can be effected, but for some reason or other cannot be promptly effected (W. N., 1875, p. 202), the plaintiff must obtain from the court or a judge (*i.e.*, by motion in court or by summons at chambers) an order for substituted or other service, or for the substitution of notice for service (ix. 2). Such order is to be obtained on an affidavit, or affidavits, showing sufficient grounds for it (x.), and in particular that the defendant is in present communication with the proposed substitute, or (as the case may be) that the notice proposed to be given will come under the defendant's observation.

§ 11. *The Writ of Summons.—Leave to Serve out of Jurisdiction.*—Assuming the action to be one within the jurisdiction of the court (xi. 1), if the plaintiff desires to serve writ upon, or to give notice thereof to, a defendant or defendants out of the jurisdiction, he must move in court for an order giving him leave so to do, upon an affidavit or affidavits showing in what place or country such defendant or defendants is or are or probably may be found, and showing whether or not such defendant or defendants is or are a British subject or British subjects, and showing also the grounds upon which the application is made (xi. 3); and in case the action is in respect of a contract or the breach thereof (xi. 1*a*), the affidavit or affidavits in support of the motion must show also various circumstances influencing the judge's discretion regarding the convenience of having the action tried in England rather than in the foreign country (*Mackenzie v. Shepherd*, 21 Sol. Jour. 339; *Woods v. M<sup>c</sup>Innes*, 4 C. P. Div. 67; *Cresswell v. Parker*, 11 Ch. Div. 601). And, *nota bene*, if the defendant is a foreigner out of the jurisdiction, then the leave to be obtained is leave to give notice of the writ to him, and not leave to serve him with the writ itself (*Westman v. Aktiebolaget*, 1 Exch. Div. 237; *Padley v. Camphausen*, 10 Ch. Div. 550), the Act 1873, § 76, preserving for this purpose the C. L. P. Act, 1852, § 19.

§ 12. *The Writ of Summons.—Leave to Amend.*—The plaintiff's indorsement of claim on writ need not (at least in the first instance) set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled (iii. 2); and if the plaintiff should afterwards desire to extend his indorsement of claim to any other cause of action, or any additional remedy or relief, he may obtain an order from the court or a judge giving him leave to do so (iii. 2). This order is obtained on motion in

court *ex parte*, and counsel's note indorsed on brief is to be initialed by the registrar, but no order need be drawn up (*Mathias v. Mathias*, W. N., 1876, p. 214). And this leave to amend writ is now not confined to amending the indorsement of claim, but extends to amending the writ generally (xxvii. 11), even as regards the addition of parties (*Ashley v. Taylor*, 10 Ch. Div. 768), but not, *semble*, the striking out of parties (*Elwor v. Vaughan*, W. N., 1879, p. 66); unless the particular party is specified in the order giving leave (*Wymer v. Dodds*, 11 Ch. Div. 436). The amended writ is to be served like the original writ (*The Cassiopeia*, 4 P. Div. 188).

§ 13. *The Writ of Summons.*—*Order to stay proceedings on.*—When the plaintiff indorses on his writ the name of a solicitor as his attorney, any defendant served therewith may (upon ascertaining from the solicitor that the name is used without authority) obtain a peremptory order to stay proceedings in the action (vii. 1). The order may be obtained on summons at chambers, upon an affidavit stating the plaintiff's unauthorised use of the solicitor's name.

Also, when the plaintiffs are partners suing by their partnership name, if they or their solicitors fail to furnish, on demand in writing by or on behalf of any defendant, the names and places of residence of all the persons who are partners in the firm, the defendant may (upon summons at chambers supported by an affidavit of that failure) obtain an order to stay all proceedings in the action upon terms (vii. 2).

§ 14. *The Writ of Summons.*—*Order to serve particular persons.*—Where husband and wife are co-defendants, the court or a judge may order the wife to be served with or without service on the husband (ix. 3).

Where an infant is defendant, the court or a judge



may order that service made, or to be made, on him or her personally shall be deemed good service (ix. 4).

Where an infant or a lunatic is defendant, the court or a judge may order that the mode of service specified in § 8, *supra*, shall not be deemed good service on him or her (ix. 4 and 5).

§ 15. *The Writ of Summons.—Issue of Concurrent Writs.*—At the time of issuing the original writ, or within twelve months thereafter, the plaintiff may issue one or more concurrent writ or writs, *i.e.*, copies of the original writ, even the date being the same, with a seal impressed on each copy, such seal containing the word “Concurrent,” and also showing the date when such concurrent seal was impressed, *i.e.*, when such concurrent writ was issued. Every concurrent writ is in force only so long as the original writ is in force; but as the original writ, which, in the first instance, is in force for one year only (viii. 1), may be kept in force for an indefinite time beyond the year by successive renewals thereof (§ 16, *infra*), the concurrent writ may, *semble*, be correspondingly kept in force (vi. 1).

A writ for service within the jurisdiction may be issued concurrently with one for service out of the jurisdiction (vi. 2), and *vice versa*,—the plaintiff being careful to comply with § 9, *supra*.\*

§ 16. *The Writ of Summons.—Renewals of.*—In case any defendant shall not have been served with the writ or concurrent writ, the plaintiff may apply before the expiration of the year for an order for renewal of the writ or concurrent writ, by summons in chambers, supported with an affidavit or affidavits

---

\* A concurrent writ may be issued, *semble*, out of the District Registry, out of which the original writ issued, if that was so.

sufficiently showing that reasonable efforts have been made to serve such defendant with the writ or concurrent writ as the case may be, or showing other sufficient grounds for the order for renewal. The renewal, if made, is for six months; a second, third, &c., renewal may be ordered in the like manner and upon the like grounds at any time during the currency of the last preceding renewal. The plaintiff, after obtaining the order, leaves a memorandum directing the renewal at the Record and Writ Clerk's Office, Chancery, and the writ or concurrent writ is marked with a renewal seal, which seal shows the day of the month and the year of the renewal. The effect of renewing the writ or concurrent writ is to keep alive the action for all purposes, and (among these), to prevent the statutes of limitation becoming a bar to the remedy. Where, by an inadvertence that is excusable, the original year has run out before the first renewal of writ, the court may (lvii. 6) make an order for renewal, notwithstanding the limit of one year, but the court cannot do so if the statutes of limitation have meanwhile operated (*Eyre v. Cox*, *In re Jones*, W. N., 1877, p. 38; *Doyle v. Kaufman*, 3 Q. B. Div. 7, 340).\*

#### SECTIONS 17-27.

THE APPEARANCE OF DEFENDANT.—THE *FORMAL* PROCEDURE WITH THE *SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 17. *The Appearance of Defendant.*—*Mode and Time of Entry of.*—The defendant enters an appearance (in Chancery matters) at the Record and Writ Clerk's Office Chancery, [and (in Common Law matters) at the office of the Division out of which the writ of summons issued].† The defendant appears by leaving a

\* The writ may be renewed in the District Registry (viii. 1), out of which it issued, if that was so (viii. 1).

† Where writ of summons issued out of District Registry, then if defendant resides or trades within the district, he is to enter his

slip or memorandum purporting to be an authority to the Record and Writ Clerks [or officer of the Common Law Division] to enter the appearance; and upon receiving this memorandum, the clerk [or officer] enters same in the cause-book (xii. 11). The normal period for appearing in the case of a defendant within the jurisdiction is the time specified in the writ, being usually eight days after service of writ of summons (see Form of Writ), and in the case of a defendant without the jurisdiction being the time limited by the court in its order giving leave to serve writ (xi. 4, and see Form of Writ). But a defendant may appear before the expiration of the time specified, and also (but in that case not without peril) after the expiration thereof, at any time before judgment is delivered (xii. 15), in the latter case giving notice of the fact to the plaintiff the very day of the appearance.

§ 18. *The Appearance of Particular Defendants.—Entry of.*—Where a partnership firm is the defendant or defendants, and the firm name is the name under which he or they are sued, he or they are to enter his or their appearance or appearances in his or their own individual names, one memorandum, however, sufficing in this case (as in other cases) for two or more defendants appearing by the same solicitor (xii. 12, 12a, 13).

§ 19. *The Appearance.—Leave for and Entry of in Particular Cases.*—(a.) If the writ of summons is indorsed with a claim for the recovery of land, the landlord (although not a defendant) may obtain on sum-

---

appearance in the District Registry (xii. 2); but if he neither resides nor trades there, he may enter his appearance in the District Registry or (at his own option) in the London Office (xii. 3); and if in such a case he enter his appearance in the London Office, he is to give notice of that fact to the plaintiff, or plaintiff's solicitor (xii. 6a), and such notice must be sent to the plaintiff's address for service within the district (xii. 6a, *Smith v. Dobbin*, 3 Exch. Div. 338).

mons at chambers, or upon motion in court, upon an affidavit of his actual or constructive possession, an order giving him leave to appear, and thereupon he leaves his memorandum of appearance at the office, and gives notice thereof to the plaintiff, and after that he is named as a defendant, and treated as such in all the subsequent stages of the action (xii. 18, 19, 20).

(b.) When an action is commenced on a bill of exchange or promissory note within six months after due, the writ of summons with which the action is commenced under the Summary Procedure on Bills of Exchange Act, 1855, directs (in effect) the defendant to obtain leave to appear, and also to appear, within twelve days after service thereof upon him (Form, Schedule A, to Act, 1855). The defendant obtains leave to appear upon summons at chambers, supported with an affidavit showing some grounds of defence to the action; and having obtained this leave, he appears in the usual way, and afterwards of course defends.

§ 20. *The Memorandum of Appearance.*—*Contents of.*—The defendant's solicitor's business address, or (if the defendant appears in person) the defendant's own residential address, is to be specified (xii. 7, 8); also, in either case, an "address for service," being some place within three miles from Temple Bar.\*

Where in an action for the recovery of land, the landlord being in possession by his tenant only, *i.e.*, in constructive and not actual possession, obtains leave to appear and defend, he is to state in his memorandum that he appears as landlord (xii. 19); and he may also (if the fact is so) state in his memorandum, that he limits his defence to any (therein specified) part of the

---

\* If appearance is entered in District Registry, the address for service is to be within the District (xii. 7, 8).

premises (xii. 21). If the memorandum of appearance should not state any limit to the defence, then such a landlord may state the limit (if any) to his defence in a notice intituled in the action and signed by himself or his solicitor, and which notice (if any) must be served on the plaintiff within four days after appearance (xii. 21).

§ 21. *The Appearance of Defendant.—Plaintiff's Motion to set aside.*—If the memorandum of appearance should not contain an "address for service," it cannot be entered at all; and if the address given is found to be illusory or fictitious, upon due inquiry, the plaintiff may apply to the court or a judge for an order setting the appearance aside (xii. 9).

§ 22. *The Appearance of Defendant.—Plaintiff's affidavit of Service in lieu of.*—In a Chancery action, if a defendant fails to appear within the specified time (§ 17, *supra*), the plaintiff is thereupon to file an affidavit of service of writ (personal or substituted, as the case may be) or of notice in lieu of service (xiii. 2, 9); and upon that being done, the action in general proceeds as if that defendant had appeared (xiii. 9).\*

§ 23. *The Appearance of Infant (or Lunatic) Defendant.—Appointment of Guardian ad litem.*—But if the non-appearing defendant is an infant (or is a lunatic not so found), the plaintiff after the expiration of the time specified for appearance gives six clear days' notice of his intention to apply to the court for the appointment of a guardian *ad litem* to such infant (or lunatic),—such notice being served in the case of the infant (or lunatic) upon or at the dwelling-house of the person who was in charge of him when the writ of

---

\* In exceptional actions, the plaintiff may sign judgment (final or interlocutory or both final and interlocutory) for defendant's default of appearance. See §§ 75–88, regarding JUDGMENTS, *infra*.

summons was served, and being further served in the case of the infant (when not in charge of his father or guardian) upon or at the dwelling-house of his father or guardian (if any) (xiii. 1). The application for the appointment of a guardian *ad litem* is in each case made upon motion, supported with an affidavit of the fitness of the proposed guardian. The plaintiff takes this course only where the person in charge of the infant (or lunatic) fails to enter an appearance; because if such person should enter an appearance, then he should himself go on to obtain, upon petition of course or upon motion, the appointment of the guardian *ad litem*; and at any rate, the plaintiff need not in such a case apply for the appointment of any guardian until the time for defendant putting in his defence.

§ 24. *The Appearance.—Summons to Interplead and Proceedings thereon.*—After a defendant has appeared to a writ of summons, and at any time before he delivers his statement of defence, he may (if he is in no way interested in, otherwise than as being the custodian of, the subject-matter of the litigation) take out an interpleader-summons, and obtain on such summons (supported by an affidavit of his own absence of interest in, and some third person's claim to, the subject-matter of the litigation) an order calling upon such third person to appear and state the nature and particulars of his claim, and staying meanwhile all proceedings in the action (i. 2, and 1 & 2 Will. IV., c. 58, § 1); and in the result, the judge (or master) may order such third person (appearing to the summons) to litigate his claim either as a defendant to the action or as a defendant to some other action, or as a party to some issue designed to determine his right, or the judge (or master) may order such third person (not appearing to the summons) to be barred of all claim as against the defendant (liv. 2a, Nov. 1878, and 1 & 2 Will. IV., c. 58, § 3). In cases where the third party

appears to the summons, the judge (or master) may also in all cases (with the consent of the plaintiff and such appearing third person), summarily dispose of the question between them (3 & 4 Will. IV., c. 38, § 1), and the judge may also in all cases where the subject-matter is trivial (at the request either of the plaintiff or of such appearing third person), summarily determine the question (23 & 24 Vict., c. 126, § 14); in which latter case, as also where the parties have consented to the judge's final determination, there is no appeal from the judge's summary decision (23 & 24 Vict., c. 126, § 17; *Dodds v. Shepherd*, L. R. 1 Exch. Div. 75); but, of course, where there has been an issue formally tried and decided, and no such consent as aforesaid, there is an appeal here as in other cases (*Witt v. Parker*, 46 L. J. Q. B. 450; and see *Withers v. Parker*, 4 H. & N. 810).

*Nota Bene.*—The sheriff is often obliged to take out an interpleader-summons, *e.g.*, when he proceeds to enforce execution on the judgment obtained in the action, and finds that the goods seized according to the directions of the judgment creditor are claimed by some third person as his. The sheriff, remaining in possession, proceeds forthwith to take out an interpleader-summons in the action, and the third person is then required to make out his title to the goods. The proceedings on this interpleader are like the proceedings upon the ordinary interpleader-summons (*Wright v. Redgrave*, 11 Ch. Div. 24).

§ 25. *The Appearance.*—*Summons to obtain leave to appear under Summary Procedure on Bills of Exchange Act, 1855.*—When an action is commenced on a bill of exchange or promissory note within six months after due, the writ of summons (with which the action commences) directs (in effect) the defendant to obtain leave to appear, and also to appear, to the writ within

twelve days after service thereof upon him (Form, Schedule A., to Act, 1855). Unless the defendant can show some defence to the action on the merits, he will not get leave to appear, and so final judgment may be entered against him after the twelve days; but if he succeed in obtaining (within the twelve days) leave to appear (upon showing some such defence as aforesaid), and if he do also thereupon appear within the time limited for his appearance to the writ, then in its other stages, the action proceeds like any other action in the High Court. The application for leave to appear is made at chambers (to the chief clerk or judge in Chancery, or to the Master in the Common Law Division), or in the district registry, when writ of summons issued thereout (liv. 2; xxxv. 4; *Oger v. Bradnum*, L. R., 1 C. P. Div. 334).

§ 26. *The Appearance.—The Consolidation of Actions.*  
—Where in the same division of the court there are several pending actions instituted by the same plaintiff or plaintiffs against divers defendants,—then, if the question or questions in dispute are substantially the same in all the actions (and, consequently, the evidence in proof or disproof of the question or questions, when of fact, is substantially the same), the court will, upon the application of the divers defendants, or of such of them as have appeared and so soon as they have appeared, order the several actions to be consolidated (li. 4). In the consolidation-order, the applicant-defendants jointly and severally undertake to abide by the verdict or judgment in the consolidated action; but this undertaking does not, of course, interfere with these defendants' right of moving to set aside the verdict, or of moving by way of appeal from the judgment. The order of consolidation, although binding on all the applicant-defendants, is not binding on the plaintiff strictly speaking, but it is binding upon him practically, that is to say, after the consolidation-order the plaintiff must proceed (at least in the first instance)



to verdict or judgment in the consolidated action, and as he may after verdict move for a new trial, and after judgment move by way of appeal therefrom in the consolidated action, he will seldom desire (where the verdict or judgment is against him) to do otherwise than adopt one or other of these two courses, although strictly speaking he may (if he choose) after verdict and judgment in the consolidated action, proceed in all or any of the other actions separately.

*Seemle*, as against non-appearing defendants in any of the several actions, the plaintiff may proceed against them as for default of appearance (§ 22, *supra*); and as to all such the consolidation-order does not apply.

*Seemle*, as against appearing defendants, not joining in the application for the consolidation-order, that order can have no application.

*Nota Bene*.—That the consolidation-order is made only where it is the same plaintiff or plaintiffs in each of the divers actions: And in the converse case, that is to say, when the plaintiffs are divers, and the defendant or defendants only are the same in the divers actions, no consolidation-order is made, but instead thereof the court will, on the application of the plaintiffs (or of such of them as choose to apply), make an order which is in effect a consolidation-order, that is to say, the court will select one (or more) of the divers actions as a test-action (or test-actions), and the plaintiffs undertaking to try these selected actions and to abide by the result therein in all the other actions, the court will (in its discretion) allow for taking the next step in these other actions such an extension of time as will permit the selected actions to be first tried (*Amos v. Chadwick*, L. R., 4 Ch. Div. 869; 9 Ch. Div. 459; *Robinson v. Chadwick*, 7 Ch. Div. 878).

§ 27. *The Appearance.—The Transfer of Actions.*—An action may, at any stage, be transferred from any one division to any other division, or, instead of being transferred, it may be retained in the division, or before the judge, to or before whom or which it has been (although improperly) assigned or commenced (Act 1873, § 36; Act 1875, § 11); the order of transfer is made by the division (or judge thereof) in which (or in whose name) the action is entitled; but the order is not obtained as a matter of course, quite the contrary (*Storey v. Waddle*, 4 Q. B. Div. 289); and the order being once made, the president of the proposed transferee division (*i.e.*, the Lord Chancellor in the Chancery Division and the respective chiefs in the Common Law and Probate Divisions) either assents thereto (in which case the order of transfer operates an effectual transfer), or dissents therefrom (in which case the order of transfer becomes a nullity, and the proposed transfer not being in fact made, although the order is made, the action remains in the division (and with the judge), in which (or in whose name) it was originally entitled), (li. 2, *Humphreys v. Edwards*, 45 L. J., Ch. Div. 112).\*

Likewise, after a decree has been made in an administration action in the Chancery Division (or in a winding up proceeding in that division), the judge who has made the decree (or his successor in office) may, without any other judge's consent, and even against the will of the parties, order to be transferred before himself any action pending in any other division by or

---

\* The Lord Chancellor, for the convenience of the administration of justice, may transfer from one division to another any action or actions, subject to the president of the transferee division assenting thereto, and he is not likely to dissent therefrom (li. 1); and the Lord Chancellor, for the like purpose, may make the like transfer from one judge in the Chancery Division to another judge in the Chancery Division (li. 1); and the transfer in the last-mentioned case may be for the purpose of trial, or of trial and further trial only, or generally (li. 1a; *Lloyd v. Jones*, 7 Ch. Div. 390).

against the executors or administrators of the testator or intestate, whose assets are being administered in the administration action (or by or against the company whose assets are being wound up), (li. 2a).

[Also, an action commenced and pending in one common law division, and the trial of which shall have been heard before a judge of another common law division, is from that time to be transferred to such other division (v. 4a, March 1879).]

### SECTIONS 28-39.

THE PARTIES TO THE ACTION.—THE *FORMAL* PROCEDURE WITH THE *SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 28. *The Parties to the Action.*—*Choice of Defendants.*—The plaintiff may join as defendants all or any of the persons severally, or jointly and severally, liable on any one contract (xvi. 5); also, all or any of the persons, some or one of whom (he believes, but is uncertain which) is or are liable, whether on contract or in tort (xvi. 6).

§ 29. *The Parties to the Action.*—*Joinder of Plaintiffs.*—All persons may be joined as plaintiffs in whom, whether jointly, severally, or alternatively, the right to the relief claimed is alleged to exist (xvi. 1).

§ 30. *The Parties to the Action.*—*Misjoinder and Non-joinder.*—The misjoinder of plaintiffs is no longer fatal to the action on the merits, and need not even be amended (xvi. 1); but the plaintiff who is successful may have to pay to the defendant or defendants the extra costs (if any) occasioned to the latter by the misjoinder (xvi. 1). The non-joinder of a plaintiff, or the selection of the wrong plaintiff, if either has arisen

through a *bonâ fide* mistake, although the mistake should be of law (*Duckett v. Gover*, 6 Ch. Div. 82; *Mason v. Harris*, 11 Ch. Div. 97), will be remedied, and a proper plaintiff or plaintiffs will be ordered to be added, or substituted, as the case may require (xvi. 1), the new plaintiff or plaintiffs consenting (xvi. 13; *Turquand v. Fearon*, 4 Q. B. Div. 280). The like remarks hold good, *mutatis mutandis*, regarding the misjoinder and non-joinder of defendants, or a defendant (xvi. 3, 5, 6, 13), but without any consent on the part of the new defendant or defendants (xvi. 13); and no defendant may object on the ground of multifariousness (xvi. 4; and see *Child v. Stenning*, 7 Ch. Div. 413; 11 Ch. Div. 82).

§ 31. *The Parties to the Action.*—*Representative Parties.*—An unknown heir-at-law or unascertained next of kin may be represented, in any action involving a question of construction that might affect him or them, by a nominee defendant (xvi. 9a). The court nominates such defendant on the application (usually) of the plaintiff.

Trustees, executors, and administrators represent their respective beneficiaries whether suing or being sued (xvi. 7), and that even under the Partition Acts (*Simpson v. Denny*, 10 Ch. Div. 28); but the court may at any time direct the beneficiaries to be joined as parties; and as regards an administrator, he must usually be a general administrator, and not merely an administrator *ad litem* (*Dowdeswell v. Dowdeswell*, 9 Ch. Div. 294). The court appears occasionally, but rarely, to dispense with the general administrator or the executor, when it already has the beneficiaries before it (*Hunter v. Young*, W. N., 1879, p. 99).

One or more persons out of a numerous class having the same or the like interest may sue or be sued, or may be ordered to defend, on behalf of the entire class (xvi. 9).

In an administration action, or in an action for the execution of the trusts of a deed, one beneficiary may sue or be sued as representing all the beneficiaries of like character (xvi. 11), the beneficiaries represented by him receiving merely notice of the decree when made (15 & 16 Vict., c. 86, §§ 42, 44; *Wingrove v. Thompson*, 11 Ch. Div. 419).

§ 32. *The Parties to the Action.*—*Infants and Lunatics.*—Infants sue by their next friends (xvi. 8), and defend by their guardians *ad litem* (xvi. 8), but are made defendants in their own proper names, and without the addition of the guardian's name.

Lunatics so found sue by their committees, and are sued by their committees, the committee and the lunatic being both made co-plaintiffs or co-defendants, as the case may be (xviii.); lunatics not so found sue by their next friends and defend by their guardians *ad litem* (*Vane v. Vane*, L. R. 2 Ch. Div. 124), but are made defendants in their own proper names, and without the addition of the guardian's name, precisely as in the case of infants (xviii.).

§ 33. *The Parties to the Action.*—*Married Women.*—Married women sue by their next friends (xvi. 8), and are sued by themselves and their husbands; but, with the leave of the court or a judge, and upon such (if any) terms as to giving security for costs as the court or a judge may direct, married women may sue without a next friend, and may defend without their husbands (xvi. 8). Where the property is separate estate, the rule is the same whether the married woman is plaintiff or defendant (*Roberts v. Evans*, 7 Ch. Div. 830); but as regards earnings, &c., under Married Women's Property Act, 1870, married women are by that Act enabled to sue alone (§ 11), but they are not

thereby enabled to be sued without their husbands (*Hancocks v. Lablache*, 3 C. P. Div. 197).

§ 34. *The Parties to the Action.*—*Partners and Landlords.*—Partners may sue and be sued in their partnership name (xvi. 10); a single person describing himself by a partnership name *must* sue in his own proper name (xvi. 10a), but *may* be sued either in his own proper name or in the assumed partnership name (xvi. 10a). Where a landlord has obtained leave to appear and defend (xii. 18, 19, 20), he is to be named as a party in all subsequent pleadings and documents (xii. 18, 19, 20).

§ 35. *The Parties to the Action.*—*Multifarious Defendants.*—Although, as we have seen (§ 30, *supra*), a defendant cannot object on the ground of multifariousness, still he may apply to the court or a judge by motion or summons for such order as may appear just to save his being embarrassed or put to needless expense in his defence of the action (xvi. 4).

§ 36. *The Parties to the Action.*—*Adding or Striking out Parties.*—In cases of the misjoinder or non-joinder of plaintiffs or defendants referred to in § 30, *supra*, if it becomes necessary to apply to the court or a judge to add or to strike out a plaintiff or a defendant, either party may apply by motion or summons before the trial or in a summary way at the trial for the requisite order in that behalf (xvi. 14); thus a defendant, added for discovery only, was ordered to be struck out (*Wilson v. Church*, 9 Ch. Div. 552); also, a plaintiff whose joinder was embarrassing has been struck out (*Smith v. Richardson*, 4 C. P. Div. 112). Where a defendant is so added, the plaintiff is to forthwith issue an amended writ of summons and to serve such defendant with it (xvi. 15) in the usual way (*i.e.*, either personally, or by substitute, or by notice in lieu of service),

and if the statement of claim has already been delivered, the plaintiff is likewise to amend his statement of claim, and to deliver the statement of claim as so amended to such added defendant, either at the same time with the amended writ or within four days after the added defendant has put in his appearance to the amended writ (xvi. 16); for, of course, such defendant must put in an appearance to the amended writ, and that within the usual period after service of amended writ (§ 17, *supra*), otherwise the plaintiff may proceed as for default of appearance in the usual way (§ 22, *supra*).

§ 37. *The Parties to the Action.*—*The Secondary (or Cross) Parties.*—It sometimes (and in fact often) happens that a defendant, whether or not liable to the plaintiff, may have in respect either of the same or of some other ground of action a remedy (of some sort or other) against the plaintiff,—in fact, some counter-claim by the primary defendant against the primary plaintiff, that is to say, against the primary plaintiff either alone by himself or in conjunction with others—such others being or not being already co-plaintiffs or co-defendants in the original action. In any of the cases specified, the primary defendant may, as a secondary plaintiff, claim relief against the primary plaintiff (either alone or in conjunction with others) as a secondary defendant (or secondary defendants), that is to say, such relief as might have been claimed against such primary plaintiff (either alone or in conjunction with others) if made a defendant (or defendants) to an independent action at the suit of the primary defendant (Judicature Act, 1873, § 24, sub-sect. 3; *Turner v. Hednesford Gas Co.*, 3 Exch. Div. 145; *Bagot v. Easton*, 11 Ch. Div. 392). And in any of the cases specified, the primary defendant is spared instituting against the primary plaintiff (either alone or in conjunction with others) an independent action (unless the court should direct him to

do so), and merely adds a counter-claim to his defence, delivering his defence and counter-claim to the plaintiff (alone or in conjunction with the others being already parties), or serving same indorsed with the direction to appear that is usual in a writ of summons upon the others (if any) not being already parties to the original action ; and all persons so served are to appear as upon service of a writ of summons ; and all defendants to the counter-claim, *i.e.*, all the secondary defendants, may plead thereto in manner hereinafter mentioned ; and the primary defendant if successful on his counter-claim obtains relief as a secondary plaintiff in the same action (*Hodson v. Mochi*, 8 Ch. Div. 569 ; *Young v. Kitchen*, 3 Exch. Div. 127). And as regards a successful counter-claiming defendant's costs, see §§ 127-129, *infra*.

§ 38. *The Parties to the Action.—The Subsidiary Defendants.*—It sometimes (and, in fact, often) happens, Firstly, that a defendant (if found liable to the plaintiff) may have in respect of the same ground of action a REMEDY OVER (of some sort or other) against some other or third person,—such other or third person being *subsidiarily* liable ; or, Secondly, that either the plaintiff or the defendant may desire that the determination of some question in the action between the plaintiff (or plaintiffs) and the defendant (or defendants) should be a determination of that question binding also as between them or either of them on the one hand and some other or third person or persons on the other hand,—such other or third person or persons being *subsidiarily* interested therein or probably or possibly affected thereby. And in either of these two cases (*Bright v. Marner*, 11 Ch. Div. 394, n.), but especially in the case first mentioned (remedy over), the third person or persons (or one or some of them) may or may not be already parties (either as plaintiffs or as defendants) in the original action (§§ 28, 29, *supra*).



Now, firstly, if the defendant to the original action (and who is hereinafter called the primary defendant) claims some remedy over as aforesaid, he is spared instituting an independent action (unless the court should direct him to do so), and as regards such of the other or third persons as are already parties, he merely delivers his defence to them (*Shepherd v. Beane*, L. R. 2 Ch. Div. 223); but as regards such of the other or third persons as are *not* already parties, he obtains the leave of the court to issue and then issues a notice of his claim (in the form No. 1 of Appendix B., Judicature Acts, 1873-75, stamped with the seal with which writs of summons are sealed (xvi. 18); but this leave to issue third party notice is not a matter of course (*Associated Home Company v. Whicheord*, 8 Ch. Div. 457); and he then files a copy of such notice, and also serves same, exactly as if it were a writ of summons, and (unless the court or judge otherwise orders) the service is to be made within the time limited for delivering his defence. Together with the notice, he is to serve also a copy of the statement of claim (if any), or of the writ of summons (if there is no statement of claim). The third person so served, if he desires to dispute the plaintiff's claim against the primary defendant, may enter an appearance within eight days after service of the notice upon him, or (with the leave of the court) after the expiration of such eight days; and if he fail to appear, then he is deemed to submit to the judgment obtained by the plaintiff against the primary defendant, whether such judgment is obtained by consent or not (xvi. 20), but if he appears, and the appearance is within the specified eight days (or, *semble*, after their expiration), then the person who issued the notice is to apply to the court or a judge for directions generally (xvi. 21), and upon such application and among such directions, the court or a judge may give the third person so served and appearing liberty to defend the action, with all

proper incidental directions (xvi. 21; *Bagot v. Easton*, 11 Ch. Div. 392). And at the trial the court is to give to such primary defendant such relief against the subsidiary defendants (or any of them) as the primary defendant might have obtained in an independent action instituted against them (Judicature Act, 1873, § 24, sub-sect. 3); *sed quære*, whether this last provision is workable (*Treleaven v. Bray*, 1 Ch. Div. 176).

And, secondly, if either the plaintiff or the defendant to the original action (and who is hereinafter called the primary plaintiff or primary defendant) desires such determination as aforesaid of any question in the action, he is spared instituting an independent action (unless the court should direct him to do so), and as regards such of the other or third persons as are already parties, and as regards also such of the other or third persons as are *not* already parties, he merely obtains from the court or a judge a form of notice (to be settled by the court or judge), and the plaintiff is to serve such notice upon or deliver the same to all the other or third persons, or such of them as the court or a judge may direct, at such time and in such manner as the court or a judge shall direct (xvi. 19); the form of notice will (*semble*) direct such of the other or third persons as are not already parties to appear to the original action; and after their appearance (or, *semble*, if they do not appear, or there are none of them to appear), then upon the application of the plaintiff, the court or a judge will give general directions regarding the determination of the question (xvi. 21).

§ 39. *The Parties.*—*Persons made Parties by Revivor.*—In case any party to an action dies, marries, or becomes bankrupt, and thereby some devolution of estate or interest arises by operation of law, the action is not to be deemed abated (l. 1; *Eldridge v. Burgess*,

7 Ch. Div. 411); but the court may order (as the case may require) the personal representative, or the husband, or the trustee, or other the successor in interest to be made (if necessary) a party to the action or to be served with notice thereof, and the court may also otherwise order as may be just (l. 2; *Twycross v. Grant*, 4 C. P. Div. 40; *Boynton v. Boynton*, 9 Ch. Div. 250). The order is made on summons or motion supported by an affidavit of the event occasioning the devolution of interest (l. 4); and, *semble*, the order is (in the case of a sole plaintiff deceased) on the voluntary application of the party seeking to be added (*Wingrove v. Thompson*, 11 Ch. Div. 419), and no compulsory order can be obtained against him, *sed quære*. And where, pending the action, there is any devolution of interest by act of the party, the action is not to be deemed abated (l. 1), but may be continued against the successor in interest (l. 3); and the requisite order may be obtained upon an *ex parte* application (by summons or motion) supported by an affidavit of the fact of the devolution of interest (l. 4). The like procedure applies where any person interested comes into existence after writ issued, his subsequent coming into existence operating, in fact, as a devolution of interest (l. 4; *Haldane v. Eckford*, W. N., 1879, p. 80).

The order in all the foregoing cases is called an order of revivor; and the order of revivor is to be served on the continuing party or parties, and also upon the new (or substitutionary) parties or party to the action, and becomes binding as from the time of service on the party served therewith (l. 5), subject, nevertheless, to be discharged upon application at any time within twelve days after service (l. 6), or (in case of effective disability) within twelve days after the removal of such effective disability \* (l. 7).

---

\* Effective disability is infancy or unsoundness of mind, when the

An action may be revived, although for costs only (33 & 34 Vict., c. 28, § 19).

But there cannot be (nor need there be) any such order of revivor, if the cause of action do not survive or continue as regards the particular party (l. 1; *Lloyd v. Dimmack*, 7 Ch. Div. 398).

## SECTIONS 40-59.

### THE PLEADINGS.—THE *FORMAL* PROCEDURE WITH THE *SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 40. *The Pleadings.—Succession of, and Times for.*—As a general rule, the plaintiff within six weeks (extendible) after defendant's appearance (xxi. 1), delivers to the defendant a statement of claim (which is the First Pleading properly so called), and the defendant thereafter, and within eight days (extendible) after the delivery of the statement of claim (xxii. 1), delivers to the plaintiff his defence (if any) to the claim, and which defence may or may not be accompanied with a counter-claim (xix. 3) against the plaintiff (either alone or in conjunction with other persons whether already parties to the action or not); and the plaintiff thereafter, and within three weeks (extendible), and any third party thereafter, and within eight days (extendible) after the delivery of the Statement of Defence (xxii. 8, and xxiv. 1), delivers to the defendant his reply. Usually the reply ends the pleadings; and no pleading subsequent to reply (other than a simple joinder of issue) can be pleaded without leave of the court or a judge, and then only upon terms (xxiv. 2). The

---

infant or unsound person has neither a guardian *ad litem* nor (being a lunatic so found by inquisition) a committee. Coverture is not an effective disability as regards revivor of actions.

time for a simple joinder of issue subsequent to the plaintiff's reply is four days (xxiv. 3).

§ 41. *The Pleadings.—Times for Delivering, Extensions of.*—Upon summons at chambers to show cause why a [specified] extension of time should not be allowed for delivering any pleading (lvii. 6), an extension of the prescribed time may be obtained; and the order when made is to be forthwith drawn up and served,—the costs of the application being costs in the action (August 1875, rule as to costs, 22). This first extension of time (and, *semble*, any subsequent extension) may and should be consented to, and no order obtained (*Ambroise v. Evelyn*, 11 Ch. Div. 759). Any second or other subsequent extension of time may be obtained, but only upon sufficient grounds, the costs being usually reserved, or not made costs in the action.

§ 42. *The Pleadings.—General Character of.*—Every pleading is to be as brief as the nature of the case will admit (xix. 2), any undue length being visited with costs. A counter-claim is to have the effect of a statement of claim in a cross action (xix. 3). Every pleading (other than a simple joinder of issue, and other than a demurrer) is to state facts in a simple and natural but accurate manner, and is not to state evidence (xix. 4), or admissions (*Davy v. Garrett*, 7 Ch. Div. 473). Every statement of claim, and also every counter-claim, is to state specifically the relief wanted, but may also ask for general relief (xix. 8). Separate and distinct facts, made the basis of separate and distinct claims, are to be kept separate in every statement of claim and counter-claim (xix. 9). Every defence to a statement of claim and every reply to a counter-claim is to deal specifically with every allegation of fact that is not admitted, and a mere general denial is not sufficient (xix. 20; *Boyd v. Nunn*, 7 Ch. Div. 284; *Collette v. Goode*, 7 Ch. Div. 842), excepting that a

simple joinder of issue operates as a general denial of every material allegation of fact in the pleading upon which issue is joined, other than such allegations as the joinder of issue expressly excepts (xix. 21). Denials of fact are to be substantial and not evasive,—denials *modo et formâ* (if standing alone) being deemed evasive (xix. 22; *Tildesley v. Harper*, 7 Ch. Div. 403; 10 Ch. Div. 393). No pleading (unless by way of amendment) is to be inconsistent with a previous pleading of the same party (xix. 19); and the relief claimed must also be consistent (*Bagot v. Easton*, 7 Ch. Div. 1; *Newby v. Sharpe*, 8 Ch. Div. 39; *Cargill v. Bower*, 10 Ch. Div. 502; *Evans v. Davis*, 10 Ch. Div. 747).

§ 43. *The Pleadings.—Particular Rules regarding.*—Every pleading containing less than ten folios of seventy-two words each may be either printed or written, or partly one and partly the other (xix. 5 and 5a). Every pleading is to be delivered to the other party or his solicitor, and in case of a defendant who has not appeared, the pleading to be delivered to him is delivered by being filed (xix. 6). A counter-claim is to be so described, so as to distinguish it from a defence properly so called (xix. 10). Pleadings in abatement are abolished (xix. 11), and apparently a motion to amend compulsorily is now substituted; also, where formerly there would have been a new assignment, there is now to be amendment simply of the statement of claim (xix. 14).

Possession is a good plea, without adding title (xix. 15), but the title must be added if the same be equitable merely, or the defence is on equitable grounds (xix. 15).

“Not guilty by statute” is a good plea; but it cannot

(excepting by leave of the court or a judge) be joined with any other plea (xix. 16).

Special defences must be specially pleaded, *e.g.*, the statute of limitations (xix. 18), the statute of frauds (xix. 23), a release (xix. 18), and such like (*Wakelee v. Davis*, 25 W. R. 60); but as regards the statute of limitations, where pleaded to the recovery of land, that defence may be taken by demurrer (*Dawkins v. Lord Penrhyn*, 6 Ch. Div. 318; 4 App. Ca. 51).

The effect of documents is to be pleaded, and not the very words (unless where, as in libel (*Harris v. Warre*, 4 C. P. Div. 125), the very words are material); fraud, malice, &c., are to be pleaded as facts simply, without showing the circumstances from which they are inferred; nevertheless, fraud must still be pleaded with great particularity (*In re Rica Gold Washing Co.*, 11 Ch. Div. 36); so also notice (unless where the precise form or terms of the notice are material); so also the existence of a contract; so also the fact of a relation having subsisted between the parties (xix. 24, 25, 26, 27). Presumptions of law are not to be pleaded (xix. 28).

§ 44. *The Pleadings.—The Statement of Claim.*—The plaintiff may unite in one statement of claim several causes of action (*Howell v. West*, W. N., 1879, p. 90), subject to the court or a judge, on the application of the defendant, directing them to be separately disposed of (xvii. 1, 8, 9),—*e.g.*, claims by or against husband and wife, with claims by or against either of them separately (xvii. 4); claims by or against an executor or administrator, as such, with claims (connected with the estate) by or against him personally (xvii. 5); and joint claims with separate claims, by all, or some, or one of several co-plaintiffs against the same defendant

(xvii. 6),—excepting, nevertheless, the two following cases, viz. :—

(1.) The plaintiff may not (unless by leave of the court or a judge) join with an action for the recovery of land any second cause of action other than a claim or claims in respect of arrears of rent, or mesne profits, or damages for breach of covenant relating to the same land or some part thereof (xvii. 2; *Pilcher v. Hinds*, 11 Ch. Div. 905); and,

(2.) The plaintiff may not (unless by leave as aforesaid) join claims by him as a trustee in bankruptcy, with claims by him in any other capacity (xvii. 3). Also, *nota bene*, there can be no such joinder of causes of action by way of counter-claim (*Macdonald v. Carington*, 4 C. P. Div. 28).

The plaintiff may deliver a statement of claim whether the defendant desires one or not, and even though the defendant expressly states he does not desire one (xxi. 1); and if the defendant expressly states that he desires one [or, *semble*, does not expressly state that he does not desire one], the plaintiff may (if his writ of summons was specially indorsed) give the defendant notice (marked like a statement of claim) to the effect that that indorsement is his statement of claim (xxi. 4).

§ 44a. *The Pleadings.—Leave to Defend.*—If the writ of summons is specially indorsed (under iii. 6 with the particulars of the debt or liquidated demand in money claimed in the action, the defendant, after appearing thereto, may by leave defend (xiv. 1, May 1877). The defendant obtains this leave upon his showing cause against an application of the plaintiff upon summons supported with an affidavit that in his (plaintiff's) belief the defendant has no defence to the



action. In order to obtain the leave, the defendant must, by affidavit or otherwise, show that he has a defence to the action on the merits (xiv. 1). The leave to defend may be granted as to part, and refused as to the rest of the claim (*Dennis v. Seymour*, 4 Exch. Div. 80). It is sufficient if the affidavit show a *prima facie* defence (*Beckingham v. Owen*, W. N., 1878, p. 215).

§ 45. *The Pleadings.—The Pleading next Subsequent to Statement of Claim.*—Upon seeing the statement of claim, the defendant must consider with himself what line of defence thereto he shall adopt,—assuming (of course) that he means to defend; and his choice of defences lies among these varieties, viz.,—(1) A demurrer, (2) A plea, and (3) A defence properly so called. Now, whether he demur or whether he put in a plea, he is taken to admit (but for the purposes only of the demurrer or plea), the truth of all the allegations contained in the statement of claim,—and in the case of the demurrer, he denies their sufficiency in law, and in the case of the plea he admits their sufficiency in law, but avoids their effect by the new matter contained in his plea. But if he defend (otherwise than by plea or demurrer), he admits or not certain only of the allegations contained in the statement of claim, and denies or else expresses that he does not admit the allegations not admitted, thereby putting the plaintiff to the proof of those expressed to be not admitted (*Harris v. Gamble*, 7 Ch. Div. 877), as well as of those denied, and adds or not other allegations of a contrary effect; and when he adopts this line of defence, he is said to put in a statement of defence properly so called, and with that statement of defence he may (if he so choose, and if it is proper that he should) conjoin also a counter-claim, taking care to expressly distinguish such counter-claim from his defence properly so called. We have therefore to consider in this place, and in the following

order, the following varieties of pleading next subsequent to statement of claim,\* viz.:—

(a.) The defendant's demurrer to plaintiff's statement of claim ;

(b.) The defendant's plea to plaintiff's statement of claim ;

(c.) The defendant's defence to plaintiff's statement of claim ; and,

(d.) The defendant's defence and counter-claim to plaintiff's statement of claim.

§ 46. *The Pleadings.—The Defendant's Demurrer to Plaintiff's Statement of Claim.*—The defendant may demur to the plaintiff's statement of claim, or to any part of it setting up a distinct cause of action, on the ground that the facts therein alleged do not show any cause of action to which effect can be given by the court against the party demurring (xxviii. 1). The demurrer must express that it is to the whole action or else to some (and what?) part (xxviii. 2) ; and it must state some ground in law for the demurrer, and same must not be frivolous (xxviii. 2).†

§ 47. *The Pleadings.—The Defendant's Plea or other Defence Proper to the Plaintiff's Statement of Claim.*—Where the defendant does not demur, he may defend by stating one simple fact (e.g., a release), in which case he is said to put in his plea in destruction of the cause of action ; or (where the defence is not of that simple character) he may defend by stating a succession of circumstances with or without (at the same time)

---

\* There may be a statement of defence even without any previous statement of claim (xxii. 2), at the option of defendant, but not so as to entitle plaintiff to require one (*Hooper v. Giles*, W. N., 1876, p. 10).

† For demurrers to other pleadings, see Tabular Statement at the end of this Epitome of the Practice.

denying or expressing that he does not admit the whole [or certain specified parts] of the statement of claim, in which case he is said properly to defend. The latter of these two modes of defence corresponds to and may be called a *traverse* or *plea in denial*; and the former of them is a *plea in confession and avoidance*, or a *plea in justification and excuse*, or a *plea in satisfaction and discharge*.

§ 48. *The Pleadings.—The Defendant's Plea of Payment into Court.*—If the defendant pay money into court in satisfaction of the cause of action, or of any part thereof,—a mode of proceeding which he may adopt, if he so choose, in any action brought to recover a debt or damages,—then,

(a.) If the payment is made before delivering his defence, he is to notify to the plaintiff the fact of such payment, specifying in respect of what claim the payment is made (xxx. 2), in which case the plaintiff may, within four days after notice, accept same in satisfaction thereof, and notify his acceptance thereof to the defendant, and after that, if the payment is specified to be in respect of the entire action, the action is at an end, excepting as regards costs (regarding which see *Greaves v. Fleming*, 4 Q. B. Div. 226; *Buckton v. Higgs*, 4 Exch. Div. 174; and §§ 127–129, *infra*); but if the payment is specified to be in respect of some part or parts only, and not in respect of the entire cause of action, then the action proceeds as to the remaining part or parts of the action (xxx. 4); and,

(b.) If the payment is made at the time of delivering the defence, then the defendant is to plead same in his defence, specifying in such defence the claim or cause of action in respect of which the payment is made (xxx. 1), in which case the plaintiff may, before delivering any reply, accept same in satisfaction thereof, and notify that fact to the defendant as aforesaid, and

after that, the action proceeds or not as aforesaid. And the defendant along with the plea of payment into court may (without any leave first obtained) plead other defences of an independent and *primâ facie* inconsistent character (*Berdan v. Greenwood*, 26 W. R. 992; and *quære Spurr v. Hall*, 2 Q. B. Div. 615). Of course, the defendant (if he should succeed in the action) will get his money out of court again, if the plaintiff has not already taken it out (*Yorkshire Banking Co. v. Beatson*, W. N., 1879, p. 96).

§ 49. *The Pleadings.—The Defendant's Defence and Counter-claim to the Plaintiff's Statement of Claim.*—Where the counter-claim raises questions between the defendant and the plaintiff, along with any other person or persons, the defendant is to add to the title of his defence a further title setting forth in such first title the names of all the parties to the counter-claim, like as if the same were a cross action (xxii. 5). The counter-claim must, as a pleading, conform to the general rules of pleading (§ 42, *supra*), and also to the particular rules of pleading (§ 43, *supra*); and merely referring in the counter-claim to the allegations contained in the statement of defence properly so called, is dangerous, as being likely to prove insufficient (*Crowe v. Barnicot*, 25 W. R. 789; 6 Ch. Div. 753; but see *Lees v. Patterson*, 7 Ch. Div. 866).

§ 50. *The Pleadings.—Counter-claim, Application to Exclude.*—The plaintiff in the original action, or any party to the counter-claim, may at any time before delivering his reply (xxii. 9) apply for an order excluding the defendant's counter-claim (*Hodson v. Mochi*, 8 Ch. Div. 569; *Huggons v. Tweed*, 10 Ch. Div. 359), upon the ground that the same should properly be raised in an independent action; and further, the plaintiff may at any time before trial of the action (xix. 3) apply for an order refusing to the

defendant permission to avail himself of his counter-claim in that action.

§ 51. *The Pleadings.—Defending in divers manners : in one defence.*—A defendant may demur to part of a statement of claim, and plead to the other part or parts, in which case he must combine both pleadings in one document (xxviii. 4; *Powell v. Jewsbury*, 9 Ch. Div. 34). A defendant may even demur to the whole (or any part) of a statement of claim, and at the same time and in the same document, but only by leave first had and obtained of the court or a judge, plead to the same statement (or some part of it) (xxviii. 5).

§ 51a. *The Pleadings.—Pleading after Demurring.*—The court when asked to grant leave to plead and demur at once to one and the same matter, may, instead of granting the leave mentioned in § 51, *supra*, direct in the alternative the demurrer to be put in alone, and may at the same time and in the same order reserve liberty to plead (if necessary) to the same matter after the demurrer is disposed of (xxviii. 5). The like liberty to plead after the demurrer is disposed of may be granted by the court at the time the demurrer is argued and overruled, if that should be the case (xxviii. 12).

§ 52. *The Pleadings.—The Reply.*—The third pleading in order of succession is either the reply or else a demurrer to defendant's statement of defence, and in either case, it may be of the plaintiff to the defendant's statement of defence or to his defence and counter-claim, or it may be of some new party defendant to the defence and counter-claim. The plaintiff's reply to a simple statement of defence is usually a simple joinder of issue thereon; and if so, that is a close of the pleadings; but occasionally his reply to a simple statement of defence introduces new matter of sub-

stance, in answer to what is alleged in the statement of defence. The plaintiff's demurrer to defence (with or without counter-claim) is governed in all respects by the rules regarding demurrer already explained (§ 46, *supra*); and the same is to be said regarding the demurrer of every third person to statement of defence and counter-claim. But where such third party puts in a reply to defendant's statement of defence and counter-claim, then such third party's reply is (in effect) his statement of defence to the defendant's counter-claim, and is to be shaped according to the rules of pleading applicable to statements of defence, as already expounded (§ 47, *supra*).

§ 53. *The Pleadings.—Defences arisen Subsequently to Action commenced.*—As a general rule, the state of matters existing at the commencement of the action (*i.e.*, at date of writ issued), is the only state of matters that is recognised. But under the old practice pleadings *puis darrein continuance* were introduced, and under the new practice defences of the like character are permitted, that is to say,—

(a.) A defendant may plead to a statement of claim a matter of defence thereto which has arisen subsequently to writ issued, introducing such new matter into his defence (if not already delivered), or into a further defence (if the first defence has been already delivered).

(b.) A plaintiff (or, *semble*, any other party defendant to a counter-claim) may plead to any counter-claim (or set-off) a matter of defence thereto which has arisen subsequently to counter-claim delivered, introducing such new matter into his reply (if not already delivered) or into a further reply (if the first reply has been already delivered).

But a further defence or a further reply (as the case

may be) cannot be put in, excepting within eight days after the matter has arisen, and by leave of the court or a judge (xx. 1, 2).

And, *nota bene*, no matters arisen subsequently to commencement of action can be included in a defendant's counter-claim (*Original Hartlepool Colliery Co. v. Gibb*, 5 Ch. Div. 713; *Ellis v. Munson*, 35 L. J. N. S. 585).

§ 54. *The Pleadings.—Plaintiff's Confession of Defence arisen Subsequently to Action commenced.*—When any defence or further defence of matter arisen subsequently to action commenced is (in plaintiff's opinion) such as to defeat his claim, then plaintiff may, instead of replying, deliver a confession of such defence or further defence, and sign judgment for costs up to date of such defence or further defence delivered (xx. 3; *Champion v. Formby*, 7 Ch. Div. 373).

§ 55. *The Pleadings.—Withdrawal of whole or part.*—A plaintiff may withdraw the entire cause of action, in which case he is said to discontinue same (see § 71, *The Trial.—Discontinuance of Action*). Or he may withdraw part only of the cause of action, doing so without leave before defendant has delivered his statement of defence or at any time before reply if statement of defence has been delivered (xxiii. 1), and doing so only with leave and upon terms at any subsequent stage of the action. The plaintiff is in each case to pay to the defendant the costs occasioned by the matter withdrawn (xxiii. 1), and for such costs the defendant may sign judgment (xxiii. 2a). A defendant may, but only with leave, withdraw the whole or any part of his defence or of his counter-claim (xxiii. 1).

§ 56. *The Pleadings.—Amendment of.*—There is no pleading (not even a simple joinder of issue)

which may not require to be amended,—and that on many accounts. Thus, in cases where formerly there would have been a new assignment, there is now to be an amendment merely of the statement of claim (xix. 14). Sometimes, however, instead of amendment of a pleading already delivered, there is to be a further pleading of the same sort, *e.g.*, either a further defence or a further reply (xx. 1, 2), as explained in § 53, *supra*. Sometimes, also, it is preferable, *semble*, instead of amending a preceding pleading, to introduce the fresh matter into the next following pleading (see § 52, *supra*). But in by far the larger number of cases, seeing that the pleadings usually close with the plaintiff's reply, it is the usual course for the plaintiff to amend his statement of claim and for the defendant to amend his statement of defence, and occasionally the one party by adverse motion may compel the other party to amend his own pleadings involuntarily (xxvii. 1). Any such amendment may be either original on the part of the amending person, or consequential upon the amendment of a previous adverse pleading.

#### I. Original amendments,—

(a.) The plaintiff may without any leave amend his statement of claim once,—provided he do so within the times following, that is to say,

(1.) Where a statement of defence has been delivered, within three weeks after such delivery,—the plaintiff not having (meanwhile) inconsistently replied to the statement of defence (xxvii. 2);

(2.) Where no statement of defence has been delivered, within four weeks of the appearance of the last appearing defendant (xxvii. 2).

(b.) The defendant may not amend his statement of defence (being a defence simply) at all without leave; but he may without any leave amend his counter-



claim once,—provided he do so within the times following, that is to say,

(1.) Where a reply has been delivered, within four days after such delivery,—the defendant not having (meanwhile) inconsistently pleaded to the reply (xxvii. 3);

(2.) Where no reply has been delivered, within 28 (twenty-eight) days from the filing (or delivery) of his defence (xxvii. 3).

(c.) Either party may, with leave, amend at any time his own pleading (being either statement of claim, statement of defence, or reply), for the purpose of defining the real question in dispute (xxvii. 1).

(d.) Either party may, upon motion, obtain an adverse order against the other party to strike out or amend anything in the adverse pleading that ought to be amended or struck out, either as being scandalous, embarrassing, dilatory, or otherwise prejudicing the fair and speedy trial of the action (xxvii. 1); *e.g.*, vague allegations of title put forward by a plaintiff, who has never been in possession of the land claimed (*Phillips v. Phillips*, 4 Q. B. Div. 127).

## II. Consequential amendments,—

(1.) In all cases of a previous adverse pleading being amended by either party without leave or order (as above explained), if the other party desires to amend his own pleading in consequence of such amendment in the previous adverse pleading, he may do so, but only with leave (xxvii. 5; *Boddy v. Wall*, 7 Ch. Div. 164; *Stokes v. Grant*, 4 C. P. Div. 45).

(2.) In all the same cases, if the other party desires the amendment of the previous adverse pleading to be disallowed, either in whole or in part, or if allowed, then to be allowed upon terms only, he may obtain an order of the court to that effect (xxvii. 4).

*N.B.*—This provision will meet the case of the amendments made being (as they may be) inconsistent with a previous pleading of the same adverse party (xix. 19).

Generally, all amendments may be made with leave, to be obtained either upon summons or by motion (xxvii. 6), but in cases other than those above specified upon terms only (*Tildesley v. Harper*, 10 Ch. Div. 393).

Every amended pleading is to be delivered to the other party within the time allowed for amending same (xxvii. 10); and where an order giving leave to amend has been requisite and has been made, the time allowed for amendment is fourteen (14) days from the date of the order, unless some other time is specified in the order (xxvii. 7), but the time may be extended (xxvii. 7). Every amended pleading is to be marked as such (xxvii. 9), the order (if any) giving leave being also specified on the amended pleading (xxvii. 9). Usually, amendments may be interlined in writing, where they do not exceed (in any one place) 144 words, and the interlineation does not occasion intricacy and obscurity; but otherwise the pleading as amended must be reprinted (xxvii. 8).

§ 57. *The Pleadings.—Close of.*—So soon as either party joins issue simply upon the last preceding pleading of another party, the pleadings as between such two parties are closed; and so, if there are other parties to the action, when the like joinder of issue is delivered as between them (xxv.) So also, if a party bound to plead neither joins issue upon the last preceding pleading nor (with or without leave, as the case may require) pleads otherwise thereto, he is taken to have admitted the statements of fact in the pleading last preceding, and such admission (although not to be

made a ground of judgment for default) operates to close the pleadings (xxix. 12). In general, the pleadings close with the reply (being the third pleading in order), as that is usually a simple joinder of issue on the defendant's statement of defence: It may, however, contain new matter; and when a counter-claim is set up in the statement of defence, then the reply necessarily contains new matter (either with or without a joinder of issue upon the portion of statement of defence that is the defence proper); and whenever, in either or any of these cases, such new matter is introduced into the reply, then some pleading or pleadings must necessarily follow the reply,—either, (1.) A simple joinder of issue upon the new matter, or (2.) With the leave of the court, a pleading containing still further new matter, in answer to the new matter contained in the reply (xxiv. 2). And so on, until there is a simple joinder of issue by either party upon the last preceding pleading of the other party; and upon such ultimate joinder of issue the pleadings are said to have closed (xxv.)\*

§ 58. *The Pleadings.—Preparation of Issues.*—The pleadings being (as already explained) simple statements of facts, it may occasionally (although of right it never should) happen that the real issue or issues in dispute between the parties are not sufficiently defined; and in that case it is necessary to define same with greater point and exactness, before going to trial. If, upon the existing pleadings, counsel is of opinion that issues should be prepared, he should move the court for an order directing their preparation, and the court in its order will provide liberty to the parties to apply to the court itself for the final settlement of the issues or any of them in case the parties themselves or their counsel cannot agree upon them (xxvi.)

---

\* See also Tabular Statement at end of this Epitome of the Practice.

§ 59. *The Pleadings.—Special Case.*—After writ issued, the parties (if so disposed) may concur in stating any special case, raising all or any questions of law involved in the action (xxxiv. 1); also, at any time before or at the trial, if it appear to the court that there is a preliminary question of law to be decided, and that the proof of facts is a matter subordinate thereto, the court may order the question of law to be decided on a special case or other form sufficiently raising it, and in the meantime the proof of facts is stayed (xxxiv. 2; *Tasmanian Railway Co. v. Clark*, W. N., 1879, p. 88).

Every special case is to be printed by the plaintiff, signed by all the parties (or their solicitors), and filed by the plaintiff (xxxiv. 3); either party may enter it (*i.e.*, set it down) for argument, first obtaining, where married women, infants, or lunatics are concerned, an order giving leave to set it down. The order is obtained upon an affidavit or affidavits of the truth of the statements contained in the special case (xxxiv. 4, 5).

## SECTIONS 60–66.

### THE EVIDENCE—THE *FORMAL* PROCEDURE WITH THE *SUMMARY* PROCEDURE INCIDENTAL THERETO.

(I.) Interrogatories.

§ 60. *The Evidence.—How far obtained by Discovery.*—At the time of delivering his statement of claim (but only in suitable cases), (*Harbord v. Monk*, 9 Ch. Div. 616), and more properly after he has seen the defendant's statement of defence (*Mercier v. Cotton*, 1 Q. B. Div. 442; *Hancock v. Guerin*, 4 Exch. Div. 3), and at any subsequent time not later than the close of the pleadings, the plaintiff may without leave, and subsequently to the close of the pleadings the plaintiff may with leave, deliver *Interrogatories* in writing for the

examination of the defendant (xxx. 1); in like manner, at the time of delivering his statement of defence, but not before delivering same, and at any subsequent time not later than the close of the pleadings, the defendant may without leave, and subsequently to the close of the pleadings the defendant may with leave, deliver *Interrogatories* in writing for the examination of the plaintiff (xxx. 1). These interrogatories should be reasonable, and not vexatious or improper (xxx. 2), unless where they are relevant, however vexatious, scandalous, or criminal-exposing (*Fisher v. Owen*, 8 Ch. Div. 654). Interrogatories going to credit only are irrelevant, and should not be put (*Allhusen v. Labouchere*, 3 Q. B. Div. 645; *Gay v. Labouchere*, 4 Q. B. Div. 206); but interrogatories as to conversations may be put, subject to certain restrictions (*Eade v. Jacobs*, 3 Exch. Div. 335). Where either party is a corporate or other public body, the other party, if desirous of interrogating it, is to obtain at chambers an order giving him leave to administer the interrogatories to any specified member or officer of the body (xxx. 4; and see *Higginson v. Hall*, 10 Ch. Div. 235).

The party interrogated is to answer by affidavit, to be filed within ten days (extendible) after service of the interrogatories upon him (xxx. 6); and the affidavit must answer sufficiently (xxx. 9), or else refuse to answer one or more of the interrogatories, stating in the affidavit the objection to answering same and the grounds of such objection (xxx. 5, Nov. 1878). The sufficiency of the answer, if the interrogating party disputes same, may be decided on summons or motion specifying the particular interrogatories or part of interrogatories objected to (*Austen v. N. & S. Woolwich Subway Co.*, 11 Ch. Div. 439),—and on this application the validity of the objection to answering and of the grounds of such objection can be gone into also (xxx. 9, 10). The grounds of objection open to be taken in the affidavit in

Answer to Interrogatories.

answer are,—That the interrogatory is scandalous,—is irrelevant,—is not *bonâ fide* for the purpose of the action,—is not sufficiently material at the then stage of the action, and such like (xxxi. 5, Nov. 1878). And the party required to answer objectionable interrogatories may also (within four days after being served with them) apply at chambers to set them aside on the ground,—That they are unreasonable,—or vexatious,—or scandalous (xxxi. 5, Nov. 1878; *Gay v. Labouchere*, 4 Q. B. Div. 206). Other usual grounds of objection to answering interrogatories are those of privilege, of exposure to criminal prosecution, &c., that are open to witnesses under cross-examination. If the court decides the affidavit to be insufficient as an answer to the interrogatories or to any of them, or if no answer at all is put in, the interrogating party may obtain an order requiring the other party to put in a further answer or an answer (as the case may be),—and that either by a further affidavit or an affidavit (as the case may be) or by *vivâ voce* examination (xxxi. 10). At the trial of an action or of an issue, any party may use in evidence any one or more of the answers of the other side without putting in the others (xxxi. 23); but the judge may (and, of course, upon the slightest suggestion, will) look at the whole of the answers (xxxi. 13).

The affidavit if not exceeding ten folios (xxxi. 7a) may be written; but otherwise it must be printed.

Non-compliance with any order to answer interrogatories subjects the defaulting party to the possibility of an order for his attachment, and also to the possibility of an order dismissing his action (if a plaintiff) or striking out his defence (if a defendant), with all incidental consequences (xxxi. 20).

II.) Order to  
make affidavit  
of documents.

On summons at chambers, unsupported (unless in exceptional cases) by any affidavit, on the application

of either party, an order will be made directing the other party to make discovery on oath of the documents relating to the action which are or which have been in his possession or power (xxx. 12). The plaintiff should not apply for this order, in general, until he has seen the defendant's defence (*Hancock v. Guerin*, 4 Exch. Div. 3). The party so ordered to make discovery complies with the order by swearing and filing an affidavit of the documents in question, in the form No. 9 in Appendix B. to the Acts (xxx. 13); and in such affidavit he is to specify such of the documents as he objects to produce (xxx. 13). His grounds of objection are usually,—That the documents are privileged,—or that they relate to the deponent's own title (*Taylor v. Batten*, 4 Q. B. Div. 85; *New B. M. I. Co. v. Peed*, 3 C. P. Div. 196; *S. & V. W. Co. v. Quick*, 3 Q. B. Div. 315; *Gardner v. Irvin*, 4 Exch. Div. 49); and occasionally, that the applicant's claim to see them is inconsistent with the position he takes up as plaintiff in his action (*Owen v. Wynn*, 9 Ch. Div. 29; and in *Tomline v. The Queen*, 4 Exch. Div. 252).

The affidavit  
of documents.

So soon as the affidavit of documents has been made, (III.) Notice to produce for inspection, &c., documents referred to in affidavit or pleading. or occasionally before it is made, *e.g.*, when it can be dispensed with, either party to the action may at any time before or at the trial give to the other party notice in writing to produce any documents referred to in his affidavits or pleadings for the inspection of the party giving the notice, and so as that such party may take copies thereof (xxx. 14).

The party who receives the notice to produce, is within two days (if the affidavit of documents has specified them all), or within four days (if otherwise), after receiving the notice, to notify to the other (*i.e.*, noticing) party a time within three (3) days from the delivery of his notification, and also a place for the inspection of such of the documents as the notifying

The offer  
of inspection,  
&c.

party does not (in his notification) specify that he objects to produce: the grounds of objection must also be specified in the notification (xxxi. 16).

(IIIa.) Order  
to produce for  
inspection.

The court may at any time in a pending proceeding order, upon the application of either party, the production upon oath by the other party of such of the documents in his possession or power as the court thinks fit (xxxi. 11); and if, therefore, the party served with notice to produce omits to notify a time and place for inspection, or objects to grant inspection (*In re Credit Co.*, 11 Ch. Div. 256), the party desiring inspection may apply for an adverse order for inspection (xxxi. 17), upon summons or by motion, supported by an affidavit showing (as regards all documents other than those referred to in the pleadings or affidavits) what the documents are, and that the applicant has a right to see them, and that they are in the possession or power of the other party (xxxi. 18). But if the court finds an objection to production stated either in the affidavit of documents or in the notification of time and place for inspection, and if the court is satisfied that the applicant's right to the inspection he asks depends on the determination of some issue or question in dispute in the action, or that it is otherwise desirable to postpone the inspection, then the court may order such issue or question to be first determined, and reserve meanwhile the right to inspection (xxxi. 19; *Phillips v. Phillips*, W. N., 1879, p. 96).

Enforcement  
of the order to  
produce.

Non-compliance with any order to make an affidavit of documents, or to produce documents for inspection, subjects the defaulting party to the possibility of an order for his attachment (xxxi. 20), and also to the possibility of an order dismissing his action if a plaintiff, or striking out his defence (if a defendant), with all incidental consequences (xxxi. 20).



§ 61. *The Evidence.*—*How far Superseded by Admissions.*—There are two varieties of admissions, viz., (1.) The admission of documents, and (2.) The admission of allegations contained in the pleadings.

(1.) Regarding documents, either party may give to the other a notice to admit documents, saving all just exceptions. The other party admits the documents specified in the notice by writing at the foot thereof the words “we admit,” &c., saving all just exceptions.

*Nota Bene.*—Documents admitted in this manner should still be put in at the trial, if they are to be used on an appeal (*Watson v. Rodwell*, 11 Ch. Div. 150).

(2.) Regarding allegations in pleadings,—

(a.) Every allegation in a pleading which is not denied or expressed to be not admitted in the next subsequent pleading (not being a simple joinder of issue) is deemed to be admitted (xix. 17), unless the alleged admission is something non-existing in law (*Chilton v. Corporation of London*, 7 Ch. Div. 735), and excepting as against a married woman, infant, or lunatic. Also,

(b.) Where a person being bound to plead in someshape or other, does not plead either by way of joinder of issue or (with or without leave, as the case may be) by some other substantive pleading to the last preceding pleading, then he is taken to have admitted the statements of fact contained in such last preceding pleading (xxix. 12). And where issues arise between a third party and plaintiff or defendant, if any of them make default in pleading to the pleading of the other or others, then judgment may be given on the pleadings without any evidence (xxix. 13). And where a defendant has refused compliance with an order to answer interrogatories, or for discovery or inspection of documents, an order may be made striking out his defence, the effect of which would, *semble*, be that all the statements of fact in statement of claim would stand admitted, and

judgment might be obtained, if not for default, at least on admissions (xxxi. 20).

§ 62. *The Evidence.—How far obtained by Inspection of Property.*—For the purpose of obtaining full information or evidence, the court or a judge may, upon the application of any party to the action, make any order for the inspection of any property, being the subject of such action, and for that purpose may, upon the same or any further application, authorise any person or persons to enter upon or into any land or building in the possession of any party to the action, and to take samples, and to make observations, and to try experiments (lii. 3).

§ 63. *The Evidence.—When Vivâ Voce.*—The general rule is, that at the trial of the action, or upon any assessment of damages, the evidence shall be taken *vivâ voce*,—each party examining in chief his own witness, who is then subjected to cross-examination by the other side (if they should so desire), and, lastly, is re-examined (if necessary) by the party calling him (xxxvii. 1); and the Judicature Acts, or the orders or rules thereunder, have made no alterations in these respects (Act 1875, § 20), excepting that, and so far as the court is thereby enabled to permit (for special reasons) depositions or affidavits to be read at the trial.

§ 64. *The Evidence.—When by Affidavit.*—Upon all interlocutory applications (*i.e.*, upon any motion, petition, or summons) in the action, the evidence may be given by affidavit (xxxvii. 2); and the evidence of any particular witness may for sufficient reasons be taken (by order) before an officer of the court (either official referee or examiner), or before a special examiner, the evidence so taken being a deposition, and the deposition being (by order) filed, and the deposition so filed being (by order) made available in evidence upon terms (xxxvii. 4); and at the trial of the action, or

upon any assessment of damages, any particular fact or facts may (by order) be proved by affidavit, but not if the witness can be produced, and the other side wishes to cross-examine him (xxxvii. 1); and at the trial, or upon any assessment of damages, the entire evidence may (by agreement of all parties) be taken by affidavit (xxxvii. 1). All affidavits at the hearing must be regarding matters of the deponent's own positive knowledge; but upon interlocutory applications, may be regarding matters of information or belief only, provided that the sources or grounds of the information or belief respectively are shown (xxxvii. 3), but not when an application although interlocutory in form is final in effect (*Gilbert v. Endean*, 9 Ch. Div. 259).

The agreement to take the entire evidence by affidavit must be in writing (*New Westminster Brewery Co. v. Hannah*, L. R., 2 Ch. Div. 217); but when the agreement does not exclude oral evidence, the affidavits may be supplemented, *semble*, at the trial by *vivâ voce* evidence (*Glossop v. Heston & Isleworth Local Board*, 26 W. R. 433). Where there is such an agreement, the plaintiff files his affidavits within fourteen days (extendible) after the agreement, and gives the defendant a list thereof (xviii. 1); and the defendant files his affidavits within fourteen days (extendible) after receiving plaintiff's list, and gives the plaintiff a list thereof (xxxviii. 2); and the plaintiff files his affidavits in reply, being STRICTLY IN REPLY to the defendant's affidavits or else merely CONFIRMATORY of previous affidavits (*Peacock v. Harper*, 7 Ch. Div. 648), within seven days (extendible) after receiving defendant's list and gives the defendant a list thereof (xxxviii. 3).

All affidavit evidence (including depositions) that is used for the first time at the trial is to be printed (xxxviii. 6); but affidavit evidence (including deposi-

tions) previously used in the action need not in general be printed (Aug. 1875, ii.), unless the court so orders, but may be printed if the parties like (Aug. 1875, iii.). No order of the court, but only the consent of the parties, is required in order to use at the trial affidavits used previously on interlocutory applications (*Blackburn Union v. Brooks*, 7 Ch. Div. 68).

§ 65. *The Evidence.—Cross-Examination on Affidavits.*—Upon interlocutory applications (*i.e.*, on a motion, summons, or petition), the court *may* (but, without very sufficient reasons, will not) order the attendance for cross-examination of the person or persons making the affidavit (xxxvii. 2); and even where the court orders the attendance for cross-examination it does not follow that such attendance is to be in court; it may be, on the contrary (and usually is and ought to be), directed to be had before an examiner of the court (*South Wales, &c., Steamship Co., In re*, 20 Sol. Journ. 232). Where the evidence in chief is directed to be taken by deposition, it is convenient to make the cross-examination follow, so as to become part of the deposition (xxxvii. 4). At the trial of the action, or upon any assessment of damages, when (by agreement) the entire evidence is taken by affidavit, any party desiring to cross-examine the people (or any of them) who have made affidavits may, within fourteen days (extendible) after the plaintiff's affidavits in reply have been filed, serve upon the other party a notice in writing requiring the production of the people (or any of them) who have made affidavits for cross-examination on their affidavits at the trial or assessment of damages (xxxviii. 4), and the other party upon being served with such notice to produce may, by subpoena *ad testificandum*, compel the attendance of such witnesses accordingly (xxxviii. 5), seeing that without their attendance their affidavits cannot in general be used at all (xxxviii. 4). The costs of pro-

ducing a witness for cross-examination are to be borne, at least in the first instance, by the party producing him (xxxviii. 4).

§ 66. *The Evidence.—Miscellaneous Points.*—

(a.) All writs and other documents issued out of or filed in the District Registry, and all exemplifications and copies thereof, purporting to be sealed with the seal of the District Registry, are receivable in evidence in all parts of the United Kingdom without further proof thereof (Act 1873, § 61).

(b.) As regards admissions of documents made in pursuance of any notice to admit same, the affidavit of the solicitor (or clerk) of the due signature of the admissions, shall, where such admissions are annexed to the affidavit, be sufficient evidence of such admissions (xxxii. 4).

(c.) As regards renewals of writs of execution, the production of the writ or of the notice renewing same is sufficient evidence of the renewal, provided the writ or notice purport to be sealed with the renewal seal of the court (xlii. 17).

(d.) Evidence may, by leave only, be taken by commission in a proper case (*Stewart v. Gladstone*, 7 Ch. Div. 394), and that either within or without the jurisdiction.

*N.B.*—Regarding evidence on *Appeals*, see §§ 130–135, *Appeals*; and regarding evidence taken *de bene esse* and the perpetuation of testimony, see the Principles of Equity, pp. 603–606, *supra*.

## SECTIONS 67-74.

THE TRIAL.—THE *FORMAL* PROCEDURE WITH THE  
*SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 67. *The Trial.*—*Venue for.*—If no venue is stated in the plaintiff's statement of claim, then the venue for trial is Middlesex, subject to the judge ordering a different venue, on motion of either party, the judge's order being appealable to a Divisional Court (xxxvi. 1). If a venue other than Middlesex is stated in the plaintiff's statement of claim, then the venue for trial is that so stated, subject to the judge ordering a different venue, on motion of the defendant (and, *quære*, of the plaintiff even), the judge's order being appealable to a Divisional Court (xxxvi. 1).

§ 68. *The Trial.*—*Notice of.*—The plaintiff gives notice of trial, and may do so either along with his reply (when that is the close of the pleadings), or at any time afterwards (xxxvi. 3); and if the plaintiff fail for six weeks (extendible) after the close of the pleadings to give the notice, the defendant may give plaintiff the notice, provided he anticipate the plaintiff in so doing (xxxvi. 4). The notice of trial is to state whether the trial is of the action or of issues therein (xxxvi. 8). The notice is usually a ten days' notice (xxxvi. 9); short notice is four days (xxxvi. 9). The notice of trial, whether the same be given by the plaintiff or by the defendant, is to specify the mode of trial intended (xxxvi. 3, 4), being one or other of the five modes of trial hereinafter specified. The notice of trial ceases to be in force, unless the action is entered for trial by one party or another within six days after the notice (xxxvi. 10*a*); and excepting by consent, or by leave, no notice of trial can be countermanded (xxxvi. 13). And, of course, the notice of

trial must be given before entering the action for trial (xxxvi. 10).

§ 69. *The Trial.—Modes of.*—There are the following modes of trial for either party to select from, viz. :—

- (1.) Before a judge (or judges) sitting alone.
- (2.) Before a judge sitting with assessors.
- (3.) Before a referee (official or special) sitting alone.
- (4.) Before a referee (official or special) sitting with assessors. And,
- (5.) Before a judge and jury (xxxvi. 2).

The party giving the notice of trial has the first right of selection; if he specify trial before a judge and jury, and the question is one which (prior to the Judicature Acts) might have been tried before a judge sitting alone, then the judge may in his discretion, upon the application of the other party (by summons or on motion), direct a trial without a jury (xxxvi. 26; *Rushton v. Tobin*, 10 Ch. Div. 558; *Spratt's Patent v. Ward & Co.*, 11 Ch. Div. 240; *Singer Manuf. Co. v. Loog*, 11 Ch. Div. 656); and the court will always do so, if there has been a consent to take the entire evidence at the trial by affidavit (*Brooke v. Wigg*, 8 Ch. Div. 510). But otherwise trial by a jury is in the option of either party, to demand as a right (Act 1875, § 22; *Sugg v. Silber*, L. R., 1 Q. B. Div. 362; *Powell v. Williams*, 12 Ch. Div. 234; and (in county courts) *Ford v. Taylor*, 3 C. P. Div. 21). And subject to such right of the party, the judge may order different questions of fact to be tried in different modes of trial, with all incidental directions (xxxvi. 6). And in matters of intricate and scientific or local examination or investigation,—of documents, accounts, and such like,—the court may peremptorily, without the consent of the parties, send same to an official or

special referee (Act 1873, § 57, explained in *Clow v. Harper*, 3 Exch. Div. 198), such referee being for this purpose a supernumerary officer of the court (Act 1873, § 58). If neither party has selected trial by jury, and if either party desires a mode of trial different to that specified in the notice of trial, then such party, within four days from service of notice of trial, may obtain (on motion or summons) an order directing such mode of trial as the applicant desires (xxxvi. 5). And either before or at the trial (when without a jury), the judge may direct any issue of fact to be tried by a judge and jury (xxxvi. 27); and in a trial without a jury the judge may also from time to time direct any question or issue of fact, or partly of fact and partly of law, to be tried at *nisi prius* (xxxvi. 29),—the order directing such trial at *nisi prius* to state on its face the reason for the direction (xxxvi. 29a, Dec. 1876); but no such reason need be given in the case of a Chancery action stating no venue, and set down to be tried in Middlesex (*Hunt v. City of London Real Property Co.*, 3 Q. B. Div. 19).

§ 70. *The Trial.*—*Entry of Action for.*—The party who gives the notice of trial is to enter the action for trial on the day of or day after the notice; and if he fail to do so, the other party may within the next four days enter the action for trial (xxxvi. 14); if neither party enter the action for trial within six days after the notice of trial, then, as regards trials in London and Middlesex only, the notice ceases to be of force (xxxvi. 10a). The party entering the action for trial is to leave two copies of the pleadings (xxxvi. 17). If the plaintiff specifies trial by jury as his selected mode of trial, the action is to be entered for trial in the Associates' office and not in the Chancery office; and if plaintiff should not have specified, but defendant should afterwards determine upon, trial by jury, the action, having meanwhile been entered in the Chancery



office, will be afterwards entered in the Associates' office (Chancery Notice, Feb. 1877).\*

§ 71. *The Trial.—Discontinuance of Action.*—When a plaintiff has become aware of any defendant's defence, whether before delivery of same, or at any time before replying thereto, he may wholly discontinue his action by delivering a notice in writing to that effect. And he may, with the leave of the court, or of a judge, and upon terms, do the like at any subsequent stage of the action; such leave will not be granted as a matter of course (*Stahlschmidt v. Walford*, 4 Q. B. Div. 217). The discontinuance does not prejudice any subsequent action, unless in the case of leave to discontinue being required and given, one of the terms is to that effect (xxiii. 1). The plaintiff is, in each case, to pay to the defendant the costs of the action (xxiii. 1), and for such costs the defendant may sign judgment (xxiii. 2). Upon any discontinuance of action, if an injunction has already been granted therein subject to the usual undertaking as to damages, the defendant may also have a reference in the action to chambers to ascertain the damages (*Newcomen v. Coulson*, 7 Ch. Div. 764). A cause, when entered for trial, may be withdrawn by consent of all parties, either the plaintiff or the defendant producing the requisite consent in writing (xxiii. 2a).

§ 71a. *The Trial.—Countermand of Notice for.*—Excepting by consent of the parties, or by leave of the court, or a judge, notice of trial cannot be countermanded (xxxvi. 13).

---

\* Actions proceeding in any District Registry may be entered for trial (in the case of Chancery actions) in the District Registry (Act 1873, § 64), and (in the case of Common Law actions) in the Associates' office, and not in the District Registry (xxxv. 1a); and apparently the Common Law rule as to entry of action in the Associates' office is to apply also to Chancery actions where plaintiff with his notice of trial specifies trial by jury as his selected mode of trial (Chancery Notice of February 1877).

§ 72. *The Trial.*—*Non-Appearance of one or other Party at.*—If the plaintiff appears and the defendant does not appear at the trial, when the action is called on, the plaintiff proves his claim so far as the burden of proof rests with him (xxxvi. 18), but the judge may postpone or adjourn the trial upon terms (xxxxi. 21).

If the defendant appears and the plaintiff does not appear at the trial, when the action is called on, the defendant (not having raised any counter-claim) may have an immediate judgment dismissing the action (xxxvi. 19), and a defendant, who has raised a counter-claim, proves such counter-claim so far as the burden of proof rests with him (xxxvi. 19), but the judge may postpone or adjourn the trial upon terms (xxxvi. 21).

In either of these cases, judgment is obtained for the party appearing; but the non-appearing party may apply within six days after trial to set aside the judgment upon terms (xxxvi. 20).

§ 73. *The Trial.*—*Appearance of all Parties at.*—Firstly,—When before a judge (or judges) without a jury, and whether sitting alone or with assessors,—being the mode of trial most usual in the Chancery Division—the course of the trial is as follows:—The plaintiff's counsel (or leading counsel) opens the pleadings by shortly stating the nature and circumstances of the claim, and reading such parts of the pleadings as are calculated to bring out same more distinctly; and at this stage the judge may interrupt him by pointing out that, even if he proved all the facts of his case, the law would not give him the right he asks, or any other right: in fact, that his statement of claim might have been demurred to. Or, if the statement of claim does not clearly appear to be demurrable, then the plaintiff's counsel (or leading counsel) mentions generally what are the defences (if any) set up by the defendant,—indi-

cating whether or not these defences would, if proved, be sufficient or not at law; and at this stage, therefore, a further discussion of the law of the case may arise,—just as if the plaintiff, instead of replying to the defendant's statement of defence, had demurred thereto.

Assuming, however, that the action is one in which the question is one of fact and of evidence principally or exclusively, then the plaintiff puts in his evidence, that is to say:—

(a.) Where the evidence is taken by affidavit, the plaintiff's counsel reads all the affidavits of any one deponent, after which the defendant's counsel cross-examines the plaintiff's witness on his affidavits, and the plaintiff's counsel then re-examines the witness; and so on through all the witnesses for plaintiff who have made affidavits or an affidavit.

(b.) When the evidence is taken *vivâ voce*, the plaintiff's counsel examines in chief each of the plaintiff's witnesses, and the defendant's counsel cross-examines the same witness, and the plaintiff's counsel re-examines him.

When in either of these two ways all the plaintiff's evidence has been put in, then,—

(1.) If the defendant mentions that he is not going to call any witnesses,—the plaintiff's counsel sums up the evidence and also points the law as applicable to the facts proved—after which (unless the court should relieve the defendant of the necessity) the defendant's counsel follows, arguing that the facts are not proved, or that the law upon the facts proved is against the plaintiff,—and in such a case, the plaintiff's counsel has no reply, beyond remarking upon the new cases (if any) which the

defendant's counsel may have cited and commented upon.

But, (2.) If the defendant (as usually happens) mentions that he is going to call witnesses, or he has already filed affidavits,—then he puts in his evidence in like manner as the plaintiff, that is to say :—

(a.) Where the evidence is taken by affidavit, the defendant's counsel reads all the affidavits of any one deponent,—after which the plaintiff's counsel cross-examines the defendant's witness on his affidavits, and the defendant's counsel then re-examines the witness; and so on through all the witnesses for defendant, who have made affidavits or an affidavit.

(b.) Where the evidence is taken *vivâ voce*, the defendant's counsel examines in chief each of the defendant's witnesses, and the plaintiff's counsel cross-examines the same witness, and the defendant's counsel re-examines him.

When in either of these two ways all the defendant's evidence has been put in,—

Then, (1.) Unless the plaintiff asks and is allowed to put in rebutting evidence as regards any part of defendant's case, the defendant sums up his evidence, and also comments upon the evidence generally of both plaintiff and defendant, and the general character of the case and the law as applicable thereto,—after which the plaintiff's counsel replies upon the whole case,—as well the evidence as the law (not forgetting the points which the defendant's counsel has endeavoured to make, or has succeeded in making).

But if, (2.) The plaintiff asks and is allowed to put in rebutting evidence as regards any part of defendant's case, then with or without an adjournment of the

trial (according as the exigencies of the case require) such evidence is put in, the manner of putting it in being the same as that above described for putting in evidence generally : and thereafter the plaintiff's counsel sums up his fresh evidence, and also comments upon the evidence generally of both plaintiff and defendant, and the general character of the case, and the law as applicable thereto, replying, in fact, upon the whole case—as well the evidence as the law (not forgetting the points which the defendant's counsel has endeavoured to make or has succeeded in making, and not forgetting to remark upon, and, if possible, distinguish and explain away, any decisions which the defendant's counsel has cited and turned to some apparent advantage).

Secondly,—Where before a judge (or judges) with a jury,—being the mode of trial least usual in the Chancery Division,—the course of the trial is as follows :—

The plaintiff's counsel addresses the jury rather than the judge ; and, as a general rule, instead of arguing the law of the case, he merely addresses himself to the facts, all objections of law that may be put forward by the judge being merely reserved (to be argued on some future occasion),—unless the judge, under exceptional circumstances, should consent to or require, as he may do (Act 1873, §§ 29, 30), the points of law to be argued before the evidence is gone into. In putting in the evidence, and in summing up same, and in generally commenting upon the case, the plaintiff's counsel and the defendant's counsel respectively proceed in a nearly similar manner to that adopted by them respectively at a trial before a judge without a jury (as above described), the jury being, however, the persons (judices) primarily addressed : and at the end the judge sums up the case

to the jury, unless he should (as he may) direct a nonsuit or a verdict for the defendant for want of evidence in support of the plaintiff's case (*Dublin, &c., Railway Co. v. Slattery*, 3 App. Ca. 1155); and the jury give their verdict, which verdict, together with the judgment (if any) then delivered, or any directions regarding judgment, are to be entered by the officer present at the trial, and whose duty it is to enter verdicts, or in his absence, by the associate (xxxvi. 22a, 23).

And at the trial by jury, the judge (it is true) may reserve any case or point in a case for the consideration of a divisional court, or may direct same to be argued before such court (Act 1873, § 46); still it is the duty of the judge,—a duty upon which any party may insist,—at every such trial to submit and leave the issues involved in the action to the jury, and to properly and fully direct the jury upon the law and the evidence bearing upon the case (Act 1875, § 22); and so far as the reservation of any case or point in a case for the consideration of a divisional court, or the direction to argue same before such court, would be inconsistent with the duty aforesaid of the judge (or the right aforesaid of the party), no such reservation or direction is to be made or given (Act 1876, § 17); but otherwise such reservation or direction may be made or given (Act 1873, § 46, and Act 1876, § 17). In case the party should think the judge to have deprived him of this right, then he is to except, *i.e.*, object, at the trial, and the exception is to be entered upon and annexed to the record (if any), as a foundation for some further application, *viz.*, motion for new trial (Act 1875, § 22). See § 83, *infra*.

Thirdly,—When before an official or special referee, whether sitting alone or with assessors,—being a mode of trial which appears to be equally little used

in all the divisions,—the course of the trial is as follows :—

The trial before a referee is to be conducted in all respects (including the taking of evidence) in the same manner, as nearly as circumstances will admit, as a trial before a judge of the High Court,—it being, however, always borne in mind that the court, or a judge, before whom or in which the action (in respect of which the reference arises) is pending, may in any particular respect give special directions to the referee as to the mode of trial (Act 1873, §§ 57, 58; xxxvi. 30–32); but, subject to such controlling authority of the court, the referee has all the powers of the court or a judge (Act 1873, § 58; xxxvi. 31, 33), excepting the power to commit or to enforce his own orders by attachment or otherwise (xxxvi. 33). Likewise, the referee may, before the conclusion of any trial before him, or in his report, submit any question for the decision of the court, or may state facts specially, with power to the court to draw inferences therefrom; also, the court has power either (1) to require any explanation or reasons from the referee, and to remit the question or any part thereof for re-trial or further consideration either to the same or to any other referee, or (2) to decide the question itself on the evidence taken before the referee with or without additional evidence (xxxvi. 34, March 1879).

§ 74. *The Trial.*—*Complectory Proceedings Subsequent to.*—All proceedings in an action subsequent to the [hearing or] trial, and down to and including the final judgment or order (not being proceedings that require a divisional court, and, of course, not being applications to the Court of Appeal), are to be had and taken, so far as is practicable and convenient, before the judge before whom the trial [or hearing] of the cause took place, (Act 1876, § 17; v. 4a, March

1879); and for the easier working of the practice in this respect (as well as for other more general reasons), every action (or other proceedings) in the High Court, and all business arising out of the same (not being proceedings that require a divisional court, and, of course, not being applications to the Court of Appeal) are to be heard, determined, and disposed of before a single judge (Act 1876, § 17).

### SECTIONS 75-88.

#### THE JUDGMENT.—THE *FORMAL* PROCEDURE WITH THE *SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 75. *The Judgment.—Various Modes and Grounds of obtaining, and Varieties of.*—Judgment may be obtained in various manners and upon various grounds, that is to say,—

- (1.) Judgment for Default of Appearance (xiii. 5-8).
- (2.) Judgment for Default of Pleading (xxix. 1-13).
- (3.) Judgment for Default of Appearance at Trial (xxxvi. 18, 19).
- (4.) Judgment on Admissions in the Pleadings (xl. 11).
- (5.) Judgment at Trial of Action (xxxvi. 22, Dec. 1876).
- (6.) Judgment on Motion for Judgment subsequent to Trial (xl. 2, 3; 7, 8).
- (7.) Judgment on Motion for Judgment without Trial (xl. 10).
- (8.) Judgment on Motion for New Trial (xl. 10).
- (9.) Judgment on Trial before Referee (xxxvi. 30-34).

Also, judgments may be either final or interlocutory,



according as no writ or some writ (or other proceeding) for the assessment of damages is necessary before such a judgment can be signed so as that execution may issue upon it; and in either case (*i.e.*, whether the judgment is final or interlocutory), the court may reserve, in a proper case, the further consideration of the action (xl. 10, 11). And interlocutory judgment directing any necessary inquiries or accounts may be made at any stage of the action (xxxiii.), and, *semble*, either upon ordinary motion (the most usual course) or upon motion for judgment, notwithstanding that as regards the relief or other relief sought in the action, or the questions or other questions involved therein, it may be necessary for the action to proceed in the ordinary way (xxxiii.). And where the writ is indorsed with a claim for an ordinary account (partnership, or trust, or such like), then immediately after the time limited for appearance to the writ, whether such appearance has been entered or not, an immediate judgment for such account may be obtained (xv. 1), and upon a simple summons at chambers (xv. 2).

§ 76. *Judgment.—For Default of Appearance to Writ.*—It is true, that in actions respecting matters exclusively assigned (Act 1873, § 34) to the Chancery Division, judgment for default of appearance cannot generally be signed, but the action is in general to proceed in the ordinary way upon the plaintiff's filing an affidavit of service of the writ (xiii. 9). There are, however, certain actions in the Chancery Division in which judgment for default of appearance may be signed, viz. :—

- (1.) In an action for the recovery of land (xiii. 7), with or without mesne profits or arrears of rent (xiii. 8), and with or without damages for breach of agreement (xiii. 8); *e.g.*, a foreclosure action (*Patey v. Flint*, W. N., 1879, pp. 86, 100).

(2.) In an action for the detention of goods (xiii. 6), with or without pecuniary damages (xiii. 6).

(3.) In an action for pecuniary damages (xiii. 6).

(4.) In an action of debt or for liquidated damages where writ is specially indorsed (xiii. 3), and where writ is not specially indorsed (xiii. 5).

§ 77. *Judgment.—For Default of Pleading.*—There are various defaults of pleading upon which judgment may be obtained, and also various judgments obtainable for such defaults.

(a.) Upon plaintiff's default to deliver (when bound to deliver) a statement of claim :—

(1.) Judgment dismissing action with costs (xxix. 1 ; *Orrell Colliery Co.*, W. N., 1879, 135). Usually, however, the plaintiff will, upon terms, be allowed a short further time to deliver his statement of claim.

(b.) Upon defendant's default to deliver a defence or demurrer to a foregoing statement of claim :—

(2.) Such judgment as the plaintiff is entitled to on his statement of claim (xxix. 10). This is the usual judgment in an action in the Chancery Division.

(3.) Judgment for the recovery of land (xxix. 7), with or without mesne profits or arrears of rent (xxix. 8), and with or without damages for breach of covenant (xxix. 8).

(4.) Judgment for the value of goods detained (xxix. 4), with or without pecuniary damages (xxix. 4).

(5.) Judgment for pecuniary damages (xxix. 4).

(6.) Judgment for amount of debt or of liquidated damages (xxix. 2),—whether writ specially indorsed or not.

(c.) Upon third party's default to deliver (when bound to deliver) any pleading,—

(7.) Such judgment as upon the pleadings the opposite party is entitled to (xxix. 13).

In the second of the seven forms of judgment above enumerated, where one or some only (and not all) of several defendants are the defaulters, the plaintiff may set the action down against such defaulters either immediately upon the default or afterwards when he enters the action for trial or sets same down on motion for judgment against the other (non-defaulting) defendant or defendants (xxix. 11).

Of these judgments, the first and seventh may be obtained on simple motion; but all the others can be obtained only upon motion for judgment duly set down.

The default of pleading upon which the seventh judgment is obtained will usually, if not always, be the default of third party to plead to some defendant's claim, counter-claim, or claim over, against him, as a *subsidiary* or *secondary* defendant, as these words are used respectively in §§ 37 and 38, *supra*.

All judgments obtained by default may usually be set aside, upon terms, where the default is satisfactorily explained or excused (*Watt v. Barnett*, 3 Q. B. Div. 183, 363; *Burgoine v. Taylor*, 9 Ch. Div. 1).

Where a party being bound to plead neither joins issue upon the last preceding pleading nor (with or without leave) pleads otherwise thereto, he is taken to have admitted the statements of fact in the pleading last preceding (xxix. 12); but this default of pleading, *semble*, does not entitle the non-defaulter to sign judgment (*Litton v. Litton*, L. R. 3 Ch. Div. 793), but operates only to close the pleadings.

§ 78. *Judgment.—For Default of Appearance at Trial.*—

(a.) If defendant fails to appear at the trial when the action is called on,—judgment may be given for the plaintiff upon his proving his claim so far as the burden of proof rests on him (xxxvi. 18).

(b.) If plaintiff fails to appear at the trial when the action is called on,—judgment simply dismissing the action (*Robinson v. Chadwick*, 7 Ch. Div. 878) may be given to a defendant who has not counter-claimed, without either swearing the jury (when there is one) or adducing evidence (xxxvi. 19); and judgment may be given for a defendant who has counter-claimed upon his proving his counter-claim so far as the burden of proof rests on him (xxxvi. 19).

*Semble*, it is not necessary for the defendant to prove in such a case that he has been served with notice of trial (*James v. Crow*, 7 Ch. Div. 410; and *quære Cockle v. Joyce*, 7 Ch. Div. 56).

§ 79. *Judgment.—On Admissions in the Pleadings.*—Any party to any action may at any stage thereof obtain, on simple motion (*In re Barker's Estate*, 10 Ch. Div. 162), or even, *semble*, on summons, such order as he is entitled to, upon any admission or admissions of facts in the pleadings (xl. 11); and such order may be obtained so soon as the right of the party appears on the pleadings (xl. 11); the order may be either upon terms or absolute.

But *nota bene*, the admission must not be of something impossible in law (*Chilton v. Corporation of London*, 7 Ch. Div. 735).

*Semble*, judgment as on admissions is not to be obtained where any party, by omitting to join issue

with or otherwise plead to the last preceding pleading, is taken to have admitted same; but that operates merely as a close of the pleadings (xxix. 12; *Litton v. Litton*, L. R. 3 Ch. Div. 793).

But, where issues arise between third party and plaintiff or defendant, if any of them make default to the pleading of the other or others, then judgment may be given on the pleadings without any evidence (xxix. 13).

Also, *semble*, when a defendant has refused compliance with an order to answer interrogatories or for discovery or inspection of documents, upon an order being (as it may be) made to strike out his defence (xxxi. 20), judgment may thereupon be obtained, on the statement of claim as admitted, *i.e.*, for default of defence.

*Nota Bene*.—An order similar to judgment on admissions in the pleadings may be obtained upon admissions in the evidence, *i.e.*, affidavits (*London Syndicate v. Lord*, 8 Ch. Div. 84; *Freeman v. Cox*, 8 Ch. Div. 148).

### § 80. *Judgment.—At Trial of Action.*—

(a.) Upon the trial of an action (whether with or without a jury), the judge may at [or after] the trial direct that judgment be entered *simpliciter* for any or either party (xxxvi. 22, Dec. 1876).

[This is the usual judgment in a Chancery action (and also in an action at Common Law),—when there are disputed questions of fact, which have to be decided upon evidence. And when judgment has so been directed to be entered *simpliciter*, any party may apply to the Court of Appeal (xl. 4a) to set aside such judgment and to enter another judgment instead thereof (xl. 4a); and in this case no *leave* to apply to the Court of Appeal need be reserved in the original direction to enter judgment (xl. 4a).]

(b.) Upon the trial of an action (whether with or without a jury), the judge may at [or after] the trial adjourn same for further consideration (xxxvi. 22, Dec. 1876).

(c.) Upon the trial of an action (whether with or without a jury), the judge may at [or after] the trial leave any party to move for judgment (xxxvi. 22, Dec. 1876).

(d.) Upon the trial of an action (whether with or without a jury), the judge may at the trial direct judgment to be entered for either or any of the parties subject to leave to move (General Procedure).

(e.) Where a defendant has in his defence raised any set-off or counter-claim, if, upon the trial of the action, the balance is in favour of the defendant, the judgment is to be given for the defendant for the balance (xxii. 10).

§ 81. *Judgment.—On Motion subsequent to Trial.—*

(a.) Upon the trial of an action (whether with or without a jury), where the judge has at the trial directed judgment to be entered subject to leave to move (xl. 2), in such a case the party to whom such leave has been reserved is to set down the action on motion for judgment, and is to give to the other party notice of such setting down within ten days after the trial or within the time specified in the reservation of leave (xl. 2). The notice of motion for judgment is to state the grounds of the motion; also, the relief sought; and it is to specify that the motion is pursuant to leave reserved (xl. 2).

(b.) Upon the trial of an action (whether with or without a jury), where the judge has abstained from making any direction at the trial as to entering judgment for either party, in such a case the plaintiff may within ten days after the trial (xl. 3) set down the action on motion for judgment and give notice of such setting down to the defendant; and if the plaintiff

does not do so, then the defendant may set it down so, and give to the plaintiff notice of such setting down (xl. 3).

(c.) Upon the trial of an action (whether with or without a jury), where the judge has directed judgment to be entered *simpliciter* for any party, the other party or parties may, without any leave reserved, apply to the Court of Appeal or (as the case may require) to the Divisional Court, to set aside such judgment and to enter any other judgment (xl. 4*a*), upon the ground that the judgment is wrong (where there is no jury) upon the finding as entered, and (where there is a jury) by reason that the finding of the jury has been wrongly entered by the judge, having regard to the findings of the jury upon the questions submitted to them (xl. 4*a*).

(d.) Unless where there is other express provision to the contrary, the judgment of the court is to be obtained on motion for judgment (xl. 1). And no judgment shall be entered after a trial without the order of a court or judge (xxxvi. 22).

(e.) Upon the trial (under any order in that behalf) of issues or an issue, the judge directs, of course, the finding only to be entered; and in such a case, the plaintiff may within ten days after the trial (xl. 7) set down the action on motion for judgment upon the findings and give notice of such setting down to the defendant; and if the plaintiff does not do so, then the defendant may set it down so, and give to the plaintiff notice of such setting down (xl. 7); and where there are several of such issues, and one or some only of them have been tried, either party (if so advised) may with leave and upon terms set down the action on motion for judgment upon the findings already found without waiting for the finding of the other issue or issues (xl. 8).

[*Seemle*, this procedure is the course to pursue in

order to obtain judgment or other order upon the report of a referee. See § 84, *infra*.]

§ 82. *Judgment.—On Motion without Trial.*—Upon any motion for judgment, the court may adopt one or other of several courses, viz. :—

(a.) If satisfied that it has before it all the materials necessary for finally determining the question or questions in dispute or any of them, or for awarding the relief sought, the court may give judgment accordingly (xl. 10).

(b.) If satisfied that it has *not* sufficient materials before it to give such judgment as aforesaid, the court may direct the motion to stand over for *further consideration*, and that in the meantime such issues or questions be tried, and such accounts and inquiries be taken and made, as it chooses to direct (xl. 10).

*Nota Bene.*—A very large proportion of actions in the Chancery Division assume this character, or are set down as motions for judgment in order to take judgment thereon for accounts, inquiries, and the like without any trial; and almost invariably the further consideration of such actions is reserved. Also, many judgments in Chancery are obtained upon minutes of the proposed judgment passed between and assented to by the respective counsel; and other judgments both at law and in equity are obtained by consent simply (*A. G. v. Tomline*, 7 Ch. Div. 388).

§ 83. *Judgment.—On Motion for New Trial.*—Upon any motion for a new trial, the court may adopt one or other of several courses, viz. :—

(a.) If satisfied that it has before it all the materials necessary for finally determining the question or questions in dispute, or any of them, or for awarding the relief sought, the court may give judgment accordingly (xl. 10).



And *vice versa*, upon application by way of appeal, the court may order a new trial to be had, instead of determining the question on the appeal (xviii. 5a, March 1879).

(b.) If satisfied that it has *not* sufficient materials before it to give such judgment as aforesaid, the court may direct the motion to stand over for *further consideration*, and that in the meantime such issues or questions be tried, and such accounts and inquiries be taken and made, as it chooses to direct (xl. 10).

[See also § 122, *Motion.—For Rule or Order to show Cause.*]

§ 84. *Judgment.—Upon Trial before Referee.*—By consent of all parties, any question or issue of fact in any civil cause or matter may be referred to a referee for him to try same, and to report the result of his trial (Act 1873, §§ 57, 58); and by compulsory order of the court or a judge, any question or issue of fact, or any question of account, in any civil cause or matter requiring either a minute examination of documents or of accounts, or a scientific or local investigation, may be referred to a referee for him to try same, and to report the result of his trial (Act 1873, §§ 57, 58). And the referee may, before the conclusion of the trial before him, or by his report, submit any question for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom (xxxvi. 34, March 1879).

In either case the report may be either adopted or set aside by the court; but if not set aside, it is equivalent to the verdict of a jury (Act 1873, § 58); and apparently judgment may be obtained upon it by subsequent motion for judgment, the judgment or

order being entered in such form as the court directs (xxxvi. 34, March 1879).

And regarding such references (whether voluntary or compulsory) and such report, the court or judge has all the powers of the Common Law Procedure Act, 1854 (Act 1873, § 59); and, in addition, the court or judge either (1) may require the referee to explain or give reasons for his report, and may remit to him or to some other referee the cause or matter, or any part thereof, for re-trial or further consideration, or (2) may itself decide the question on the evidence taken before the referee, with or without additional evidence as the court may direct (xxxvi. 34, March 1879; *Dunkirk Colliery Co. v. Lever*, 9 Ch. Div. 20).

*Nota Bene*.—No compulsory reference of the entire action can be made under the Judicature Acts (*Longman v. East*, 3 C. P. Div. 142; *Pontifex v. Severn*, 3 Q. B. Div. 295; and *Mellin v. Monico*, 3 Exch. Div. 144).

§ 85. *The Judgment*.—*Interlocutory Order for Account*.—Where the writ is indorsed with a claim for an account (being the ordinary account of a trust or partnership, or such like), then immediately after the time limited for appearance to the writ, and upon a simple summons at chambers, supported by an affidavit stating the plaintiff's grounds of claim for the account (xv. 2), an order for the account will be made,—

(a.) Where defendant has not appeared,—as a matter of course; and,

(b.) Where defendant has appeared,—unless the defendant satisfies the court or a judge that the plaintiff's right to the account depends upon the decision (in his favour) of some preliminary question (xvi. 1).

The order directing the account (if any order is made) will include all usual directions (xv. 1); *semble*, a statement of claim is necessary in these cases (*In re Huckwell, David v. Dalton*, W. N., 1879, p. 86).

Also, and at any stage of the proceedings, the court or a judge will, and that either upon ordinary motion (the most usual course), or upon motion for judgment, make an interlocutory order for any necessary accounts and inquiries being taken and made, notwithstanding that, as regards the relief, or other relief, sought in the action, or the questions, or other questions, involved therein, it may be necessary for the action to proceed in the ordinary way (xxxiii.).

§ 86. *The Judgment.*—*Where Signed for Costs only.*

(a.) Where an action is wholly discontinued by a plaintiff, or any matter involved therein is withdrawn by the plaintiff, then the defendant may (if his taxed costs are not sooner paid) sign judgment for such costs, in respect either of the total discontinuance or of the matter withdrawn (xxiii. 2).

(b.) Similarly, *semble*, where the defendant is successful in defeating the plaintiff's action, and the defendant has not asked (or not succeeded in getting) any substantive or independent relief on counter-claim.

§ 87. *Judgment.*—*Entry of.*—When the court pronounces judgment, or when a judge in court does so, the judgment as entered is to be dated as of the day on which it is pronounced, and takes effect from that date (xli. 2); but in other cases, the judgment is to be dated and to take effect only as from the day that the pleadings required to be left on the entry (xli. 1) are in fact left (xli. 3).\*

---

\* Of judgments, the entry is usually in the London Office; and if the action is one proceeding in the District Registry, then an office copy merely of the judgment is transmitted to the Registry to be filed

§ 88. *Judgment of Non-suit.*—*Effect of.*—In general, a judgment of non-suit is to have the same effect as a judgment for the defendant upon the merits (xli. 6), but the court may in any particular instance otherwise direct (xli. 6); also, in any case of mistake, surprise, or accident, any judgment of non-suit may be set aside upon terms (xli. 6).

### SECTIONS 89–109.

#### THE EXECUTION.—THE *FORMAL* PROCEDURE WITH THE *SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 89. *The Execution.*—*Varieties of.*—The varieties of writs of execution are the following:—

- (1.) Writ of *Fi. Fa.*;
- (2.) „ *Elegit*;
- (3.) „ *Possession*;
- (4.) „ *Delivery*;
- (5.) „ *Sequestration*;
- (6.) „ *Attachment*;
- (7.) „ *Capias*;
- (8.) „ *Ca. Sa.*
- (9.) Writs assistant to other writs, viz.,—
  - (a.) Writ of *Venditioni Exponas*;
  - (b.) „ *Distringas nuper vicecomitem*;
  - (c.) „ *Fi. fa. de bonis ecclesiasticis*;
  - (d.) „ *Sequestrari facias de bonis ecclesiasticis*;
  - (e.) „ *Assistance*;
- (10.) Writ of *Distringas* (on stock);
- (11.) Charging order (on stock or shares); and,
- (12.) Garnishee order.

---

therein. But all orders made by the District Registrar himself, and all judgments in actions proceeding in the District Registry, which are signed by consent, or for default of appearance to writ, or of pleading, are entered in the District Registry (xxxv. 2).

§ 90. *The Execution.*—*Judgments upon which it may issue.*—These are,—

(1.) Judgments for recovery or payment of money (xlii. 1);

(2.) Judgments for payment of money into court (xlii. 2);

(3.) Judgments for the recovery of the possession of land (xlii. 3), or for the delivery of the possession of land (xlii. 3);

(4.) Judgments for the recovery of any property, other than land or money (xlii. 3); and,

(5.) Judgments requiring any person to do (or to abstain from doing) any act other than the payment of money (xlii. 5).

The judgment need not be final, but may be interlocutory,—it being remembered that not all executions issue on all judgments (*Widgery v. Tepper*, 6 Ch. Div. 364; *Cremetti v. Crom*, 4 Q. B. Div. 225). Moreover, every order of the court or a judge may be enforced in the same manner as a judgment to the like effect (xlii. 20).

§ 91. *The Execution.*—*The Mode of Issuing.*—Produce to the proper officer either the judgment or an office copy thereof, showing the date of entry of judgment (xlii. 9). Also, file a praecipe signed by or on behalf of the party (or his solicitor) issuing it (xlii. 10), and containing the following particulars, viz. :—

(1.) Title of action and reference to record;

(2.) Date of judgment;

(3.) Date of order (if any necessary) giving leave to issue; and,

(4.) Names of the parties against whom (or of the firms against whose goods) the writ is to issue (xlii. 10).

The writ of execution is dated as of the day of issue (xlii. 12).

The writ of execution is to be indorsed as follows :—

(a.) If party issue same in person, indorse a memorandum to that effect, and all particulars of his place of residence, not forgetting the number (if any) in the street (xlii. 11).

(b.) If party's solicitor issue same, indorse the name and either the residence or the office of such solicitor (xlii. 11).

(c.) If agent for party's solicitor issue same, indorse name and either the residence or the office of the party's solicitor, and indorse also the name and residence of such agent (xlii. 11).

The writ of execution (when it is for the recovery of money) is to be further indorsed with a direction to the officer to levy the sum (specifying same) due under judgment, and also interest (when interest claimed) at £4 per cent., or other (if any) the rate of interest for which the judgment was agreed (xlii. 14); but, *semble*, the direction does not extend to poundage, or fees, or expenses of execution, which are to be levied without any such direction (xlii. 13).

In the writ itself, that is, in the body thereof, the directions to the officer are more explicitly contained, being suited in each case to the form of writ that is wanted (whether *fi. fa.*, *elegit*, or other form); and the costs (if any) recovered in the action, together with interest thereon at the rate of £4 per cent. per annum, computed from the date of the Taxing Master's certificate (*Schroeder v. Cleugh*, 46 L. J. C. P. Div. 365) are also therein particularly directed to be levied (Forms, Appendix F, Judicature Acts).

§ 92. *The Execution.—The Time of Issuing.*—Immediately upon entry of judgment for any sum of money, or for any costs (being first taxed), either *fi. fa.* or *elegit* may issue, unless payment of either is by the judgment deferred beyond the date of such entry (xlii. 15). But in such cases, by special order, execution may issue sooner than entry (xlii. 15), or may be stayed until any time (xlii. 15).

In judgments of other sorts, the time for doing the act is, in general, expressed in the judgment.

As between the original parties to the judgment, execution may issue at any time within six years after recovery of judgment (xlii. 18), and afterwards by leave only (xlii. 19).

No execution may issue for the first time after the expiration of twenty years after recovery of judgment.

The writ (remaining unexecuted) holds good for one year only after issue (xlii. 16), but may (before it has expired) be renewed by leave for one year more from the date of the renewal, and so on (xlii. 16); and such renewal and successive renewals have this effect, viz., the writ of execution takes effect, and is entitled to priority, as from the date of the original delivery thereof (xlii. 16).

In certain cases, a plaintiff may have judgment and execution thereon against one or more (short of all) of several defendants, and proceed with his action in the ordinary way against the other defendants; that is to say, in the following cases:—

(1.) To a writ specially indorsed (under iii. 6), with the particulars of debt or liquidated damages, judgment

and execution against the non-appearing defendant or defendants (xiii. 4).

(2.) To a writ specially indorsed as aforesaid (under iii. 6), if (after plaintiff has delivered his statement of claim) any one or more (short of all) of several defendants, having leave to defend, make default of pleading to the statement of claim, judgment and execution against such defaulting defendant or defendants (xxix. 3).

(1a.) To a writ specially indorsed as aforesaid (under iii. 6), if one or more (short of all) of the defendants obtain leave to defend, and the other or others do not, judgment and execution against the latter or against these latter (xiv. 5).

On the other hand, in an action specially indorsed as aforesaid, execution on judgment for part, where defendant has leave to defend as to the other part of the action (xiv. 4), is to be suspended as a general rule, pending the defence as to the other part (xiv. 4); and similarly, in effect, on interlocutory judgment for default of pleading (xxix. 5), in an action for detention of goods or pecuniary damages, or both (*Dennis v. Seymour*, 4 Exch. Div. 80).

§ 93. *The Execution.—Amount to be Levied.*—The writ of execution (when it is for the recovery of money) directs (in an indorsement thereon) that the officer shall levy the sum (specifying same) due under the judgment, and shall also levy interest (where interest claimed) at £4 per cent., or other (if any) the rate of interest for which the judgment was agreed (xlii. 14); and in addition, there may be levied the poundage, and fees, and expenses of execution (xlii. 13).

And upon every writ, the costs recovered, together with interest thereon at the rate of £4 per cent. per



annum, computed from the date of the Taxing Master's certificate (*Schroeder v. Cleugh*, 46 L. J. C. P. Div. 365), may likewise be levied, and are in the body of the writ expressed to be thereby directed to be levied (Forms, Appendix F, Judicature Acts).

§ 94. *The Execution.*—*The Writ of Fi. Fa.*—This is the commonest form of execution, being applicable to the seizure of personal (but not of real) property. The writ is to have the same force and effect, and is to be executed in the same manner, as before the Judicature Acts, 1873–75 (xliii. 1). And in aid of it, all the various writs that were theretofore issuable in aid of it, continue so issuable (xliii. 2).

§ 95. *The Execution.*—*Fi. Fa. against Garnishee upon Order to attach Debts.*—Execution by *fi. fa.* against a garnishee may issue by order of the court or a judge (xlv. 4), without any previous writ or process, to levy the amount of any judgment debt,—to the extent of the moneys or debts belonging to the judgment debtor in the hands of or owing from such garnishee (xlv. 4); and for the purpose of ascertaining such moneys or debts, the court or a judge will, upon the application of the judgment creditor, make (when necessary) an order against the judgment debtor for his examination *vivâ voce* before an officer of the court or special examiner (xlv. 1), and may also order the production of books and documents (xlv. 1). The garnishee may, however, forestall such execution, by appearing to the garnishee order *nisi* hereinafter mentioned; and paying into court the amount of the judgment debt (to the extent of such moneys or debts as aforesaid); and the court or a judge will not issue immediate execution, if the garnishee, having appeared as aforesaid, *bonâ fide* disputes the fact of any such moneys being in his hands or of any such debts being due from him to or on behalf of the judgment debtor (xlv. 5), but the

court or a judge may in that case issue such execution (xlv. 7), subject to the determination of any issue or question against or affecting the garnishee (xlv. 5), and also as against (when necessary) any third person whom the garnishee alleges to be the owner of, or to have any lien on, the moneys (if any) in his hands or the debt (if any) owing from him (xlv. 6).

The applicant applies in the first instance *ex parte*, upon summons or motion supported with an affidavit by himself or his solicitor (xlv. 2), and obtains a garnishee order *nisi*, in which order (or in some subsequent order) the court or a judge further directs the garnishee, and any such third person as aforesaid, to appear and show cause against the order *nisi* (xlv. 2, 6).

The effect of the garnishee order *nisi* is (like that of a charging order *nisi*) to bind, as from the date of service of the order (*In re Stanhope Silkstone Collieries*, 11 Ch. Div. 160), all [moneys and] debts [in the hands of or] owing from the garnishee to the judgment debtor (xlv. 3).

Upon failure to appear to the order requiring appearance, the garnishee order *nisi* becomes instantly absolute as against the person so defaulting, whether such defaulter be the garnishee himself (xlv. 4) or such third party as aforesaid (xlv. 6).

The garnishee is discharged,—as against the judgment debtor (xlv. 8) and also as against such third party (xlv. 7),—by any execution levied upon the garnishee (xlv. 8) and,—but, *semble*, only as against the judgment debtor,—by any payment made to forestall such execution (xlv. 8), even though the judgment should be afterwards reversed (xlv. 8).

[Regarding *Foreign Attachment*, see *Levy v. Lovell*, 11 Ch. Div. 220.]

§ 96. *The Execution.*—*The Writ of Elegit.*—Next to the writ of *Fi. Fa.*, this is the commonest form of execution, being applicable to the seizure (paramountly) of real property and putting the judgment creditor in possession thereof, together also with (at a price) all the goods and chattels of the debtor (other than his oxen and beasts of the plough). The writ is to have the same force and effect, and is to be executed in the same manner, as before the Judicature Acts, 1873–75 (xliii. 1). And in aid of it, all the various writs that were theretofore issuable in aid of it continue so issuable (xliii. 2).

§ 97. *The Execution.*—*The Writ of Possession.*—Issues for the recovery of the possession of land (xlii. 3), or for the delivery of the possession of land (xlii. 3).

(a.) The writ of possession, when the judgment is in form for the delivery of possession by a person in that behalf named in the judgment to another person, issues in the following manner:—

The applicant for it must have first duly served the judgment (xlvi. 2), and the possession not having been sooner delivered pursuant to the judgment, the applicant for the writ of possession then files an affidavit of service of the judgment, and of such non-delivery (xlvi. 2); and thereupon the writ of possession issues without any order (xlvi. 2).

(b.) The writ of possession, when the judgment is in form for the recovery of possession, issues as it used formerly to issue in an action of ejectment at common law (xlvi. 1), that is to say, on the fifth day in term next after the verdict, or within fourteen days after such verdict, whichever shall first happen, or (if so ordered at the trial) on any day within the fifth day

in term next after the verdict (C. L. P. Act, 1852, § 185); and before issuing execution, the proceedings in the action need not be entered on any roll, but a mere *incipitur* of the judgment is to be made on paper (C. L. P. Act, 1852, § 206). [See generally, 2 Chitty's Practice, 12th ed. pp. 1044-1047; also, § 136, *infra*.]

§ 98. *The Execution.—The Writ of Delivery.*—Issues for the recovery of any property other than land or money (xlii. 4).

It issues and is enforced in the manner in which it used formerly to issue and be enforced in an action of detinue at common law (xlix.), that is to say, it issues only by leave of the court (C. L. P. Act, 1854, § 78), and directs the sheriff to deliver the specific property (if it can be found) and (if it cannot be found) then to distrain all the lands and chattels of the defendant until he do render up the specific property, or until the assessed value of such specific property is obtained (C. L. P. Act, 1854, § 78), the costs being levied on the same or on some subsequent several execution (C. L. P. Act, 1854, s. 78). [See generally 1 Chitty's Practice, 12th ed. pp. 710-713.]

§ 99. *The Execution.—The Writ of Attachment.*—No writ of attachment is to be issued without leave (xliv. 2); the leave is to be obtained on motion upon notice (xliv. 2). A writ of attachment may issue in any of the following cases:—

(1.) To enforce the doing, or forbearing from, any act (other than the payment of money) ordered to be done or forborne (xlii. 5).

(2.) To enforce the payment into court of money ordered to be so paid,—in any case in which imprisonment for debt is authorised by law (xlii. 2; Debtors' Act, 1869, §§ 4-7).

(3.) To enforce the recovery of any property not being either land or money (xlii. 4).

The writ of attachment has the same effect as the old writ of attachment in Chancery (xliv. 1),—that is to say, the person when once attached (*i.e.*, taken and put into prison, or, if already in prison when found, then detained further in prison) cannot be bailed out, but must remain in prison until he has cleared his contempt by performing the act required of him (or, in a proper case, expressing contrition for his contempt), and by paying (unless a pauper) the costs of the contempt.

*Nota Bene.*—The writ of attachment is not a penal writ; therefore it is relievable under Debtors' Act, 1878 (*Barrett v. Hammond*, 10 Ch. Div. 285); and in a proper case, the court will, in lieu of committal, *i.e.*, attachment, direct payment of the debt by instalments (*Esdaille v. Visser*, W. N., 1879, p. 52; *Dillon v. Cunningham*, L. R., 8 Exch. 23; *Hewitson v. Sherwin*, L. R., 10 Exch. 53).

Attachment may issue against a solicitor (for misconduct in an action) in the following cases:—

(1.) Where he has given a written undertaking to appear on behalf of a defendant to the writ of summons, and does not enter such appearance accordingly (xii. 14). And,

(2.) Where he has been served with an order against his client for discovery or inspection of documents, and he neglects [inexcusably] to bring the order to the notice of his client (xxxi. 22).

Any party failing to comply with an order to answer interrogatories, or to make discovery or inspection of documents, is liable to attachment (xxxi. 20);

and service of the order, or a true copy thereof, but not an imperfect copy (*In re Holt*, W. N., 1879, p. 48), on his solicitor is sufficient service to found an application for the attachment (xxxi. 21).

A referee cannot enforce any of his orders by attachment (xxxvi. 33); and neither can a master (liv. 2); and neither can a district registrar (xxxv. 4, and liv. 2).

§ 100. *The Execution.*—*The Writ of Sequestration.*—A writ of sequestration may issue without leave (xlvii.) in the following cases:—

(1.) To enforce the doing of any act (other than the payment of money into court) ordered to be done within a limited time (xlvii.).

(2.) To enforce the payment of money into court ordered to be so paid within a limited time (xlvii.).

(3.) To enforce the recovery of any property not being either land or money (xlii. 4).

The order sought to be enforced must have been served, and the time specified in the order must have expired before the writ can issue (xlvii.); nor can a sequestration issue, *semble*, unless to a previous writ of attachment the sheriff has made a return of *non est inventus* (§ 106, *infra*), or unless it issue under § 8 of Debtors' Act, 1869, or unless the court has been asked, and has refused, to issue a previous attachment (*Sprunt v. Pugh*, 7 Ch. Div. 567).

The writ of sequestration has the same effect as the old writ of sequestration in Chancery; and the dealing by the court with the proceeds of the sequestration is also still the same (xlvii.), that is to say, the sequestrators appointed (usually *four* in number) enter upon the real estate, and receive and sequester and take

the rents and profits thereof, and also all the personal estate of the person who has disobeyed the order of the court, and who is in contempt for so doing; and the court may subsequently direct a sale of the goods or any of them, and will also direct the application of all rents and of the proceeds of all sales. The sequestrators are accountable to the court.

§ 101. *The Execution.*—*The Writ of Capias.*—This writ may still issue under the new practice (xlii. 6), but only in cases in which, and for purposes for which, it would have been issuable before the commencement of that practice, that is to say,—

It is issued (no longer as a means of commencing an action, but) after the commencement of the action, and upon the application of the plaintiff only (*Williams v. Griffith*, 3 Exch. 584), and by leave of the judge, in cases where the cause of action amounts to £50 and the defendant is about to quit England (1 and 2 Vict., c. 110, § 3; and Debtors' Act, 1869, and Absconding Debtors' Act, 1870; and see *Ex parte Gutierrez, in re Gutierrez*, 11 Ch. Div. 289). The form of writ prescribed by 1 and 2 Vict., c. 110, § 3, must be rigorously adhered to. [See generally 1 Chitty's Practice, 12th ed. pp. 765-777.]

§ 101a. *The Execution.*—*The Writ of Capias ad Satisfaciendum.*—This writ (commonly called *Ca. Sa.*) is nowhere mentioned in the Acts or Orders or Rules, but appears to be included among the general words (xlii. 23). [See generally 1 Chitty's Practice, 12th ed., pp. 694-710; and Debtors' Act, 1869, and Absconding Debtors' Act, 1870.]

§ 102. *The Execution.*—*Writs Assistant to other Writs.*

(a.) *Venditioni Exponas*, the writ of, issues where

the sheriff upon an execution by *fi. fa.* has taken goods, and he returns that he has taken same, but that they remain in his hands for want of buyers. The writ is really only a direction to the sheriff to go on in a particular manner, and do his duty at all costs and hazards (1 Chitty's Practice, 12th ed. pp. 678, 679).

(b.) *Distringas nuper vicecomitem*, the writ of, issues to the successor in office of a sheriff, when the previous sheriff has returned that he has taken goods, and that same remain in his hands for want of buyers; and it directs the new sheriff to distrain the old (*nuper*) sheriff (*vicecomitem*) so as to compel him to do his duty by effecting a sale at all costs and hazards (1 Chitty's Practice, 12th ed. pp. 679, 680).

(c.) *Fi. Fa. de bonis Ecclesiasticis*, the writ of, issues where the sheriff has returned upon an ordinary *fi. fa.* that the debtor is a beneficed clerk, and is directed to the bishop of debtor's diocese, and the bishop executes the writ forthwith by appointing sequestrators of the profits of the benefice (2 Chitty's Practice, 12th ed. pp. 1283, 1284).

(d.) *Sequestrari Facias de bonis Ecclesiasticis*, the writ of, issues (at the option of the creditor) in lieu of the writ of *Fi. Fa. de bonis ecclesiasticis*, and in the like case; it commands the sheriff to enter into the rectory and parish church, and sequester the profits thereof, and also all other the ecclesiastical goods of the debtor (2 Chitty's Practice, 12th ed. p. 1284).

(e.) *Assistance*, the writ of, may issue (at the option of the plaintiff) in lieu of the writ of attachment, where a decree or order directing possession of property to be given has been disobeyed. The writ is directed to the sheriff, who is to put the plaintiff into the possession; and no demand of possession prior to issuing the writ is necessary. The writ issues with leave only, to be obtained on *ex parte* motion (see 1 Dan. Ch. Pract., 5th ed. 923, 924).



§ 103. *The Execution.*—*Writ of Distringas on Stock.*  
—Issues out of the London office, out of which writs of summons are issued (xlvi. 2). Any person may issue it who claims to be interested in any stock transferable at the Bank of England standing in the name of any other person (xlvi. 2). The writ issues upon filing an affidavit swearing to the interest of the applicant, and identifying the stock (Morgan's Chanc. Acts, 5th ed. p. 586; 5 Vict., c. 5, § 5).

[*N.B.*—Under the 4th section of 5 Vict., c. 5, an injunction in the nature of, but much more efficacious than, a writ of distringas, may be obtained summarily in the Chancery Division against, not only the Bank of England, but any public company whatsoever, to restrain the transfer of (or the payment of dividends upon), not only any stock, but also any shares, in the books of such bank or company.]

§ 104. *The Execution.*—*Order Charging Stock or Shares.*—May be obtained from any Divisional Court, or from any judge (xlvi. 1), or even, so far as it is *nisi*, from a Master (liv. 2a, Nov. 1878). The order is obtained in the following manner:—The applicant applies *ex parte* for a rule to show cause (1 & 2 Vict., c. 110, § 14), and a rule or order *nisi* is at once made, upon an affidavit identifying the stock or shares, and verifying the fact of an unsatisfied judgment having been recovered against the party beneficially entitled to the stock or shares, whether the same stock or shares are standing in his (the judgment debtor's) own name, or in the name of a trustee for him (1 & 2 Vict., c. 110, §§ 14, 15), or in the name of the Paymaster-General, as a trustee for him (3 & 4 Vict., c. 82, § 1), and the affidavit also, of course, makes out the right of the judgment debtor to the stock or shares in question, such interest being either in possession or

in reversion, and either vested or contingent (3 & 4 Vict., c. 82, § 1).

The judgment debtor must show cause against the order *nisi* within the time specified in the order; and if he fail to show cause at all, or do not show enough cause against it, the order is made absolute, upon proof of notice of the order *nisi* (1 & 2 Vict., c. 110, § 15).

*Nota Bene.*—An order charging stock or shares cannot be made absolute where the judgment debtor is dead when the order *nisi* is obtained (*Finney v. Hinde*, 4 Q. B. Div. 102).

§ 105. *The Execution.*—*Garnishee Order.*—The applicant for this order applies in the first instance *ex parte* upon summons or motion supported with an affidavit by himself or his solicitor (xliv. 2), and obtains a garnishee order *nisi*,—being an order charging, to the extent (at least) of the judgment debt, all moneys belonging to the debtor in the hands of the garnishee and all debts owing from the garnishee to the debtor. If necessary for the purposes of discovery, the court or a judge will, upon the application of the judgment creditor, make an order against the judgment debtor for his examination *vivâ voce* before an officer of the court or special examiner, and for the production of books and documents (xliv. 1).

The effect of the garnishee order *nisi* is (like that of a charging order *nisi*) to bind, as from the date of service of the order (*In re Stanhope Silkstone Collieries*, 11 Ch. Div. 160), all [moneys and] debts [in the hands of or] owing from the garnishee to the judgment debtor (xliv. 3).

The garnishee order *nisi* may be made absolute in the following manner:—

(1.) If the garnishee do not appear to the order requiring him to appear and show cause against the order *nisi*, then that order is made absolute at once (xliv. 4).-

(2.) If the garnishee do appear to such order requiring his appearance, and *bonâ fide* disputes the fact of any moneys belonging to the judgment debtor being in his hands, or any debts being due from him (the garnishee) to the judgment debtor (xliv. 5), or alleges some third person to be owner of or to have some lien on such moneys or debts (xliv. 6),—then as against such third person not appearing (when duly notified so to do), and also as against such third person duly appearing, and as against the garnishee, the order is made absolute, subject to the determination of any issue or question between the garnishee and the judgment debtor and the (appearing) third person (xliv. 7).

The garnishee paying under any garnishee order (*semble*, whether *nisi* or *absolute*) is thereby discharged to the extent of such payment, as against the judgment debtor, even though the judgment should be afterwards reversed (xliv. 8).

*Nota Bene.*—A garnishee order does not issue on judgment dismissing action for want of prosecution (*Cremetti v. Crom*, 4 Q. B. Div. 225), nor against proceeds of judgment paid into County Court as a debt due from the Registrar of that Court to the judgment debtor (*Dolphin v. Layton*, 4 C. P. Div. 130).

§ 106. *The Execution.*—*Order of Issuing Divers Writs.*—Nothing in the Judicature Acts and rules is to affect the order in which writs of execution may be issued (xlii. 24). That order has already appeared in the preceding sections.

§ 107. *The Execution.*—*Leave to Issue.*—When

judgment is subject to any condition or contingency, upon fulfilment of the condition or happening of the contingency, the party entitled to the judgment is to demand satisfaction thereof from the other party liable thereto (xlii. 7); and failing such satisfaction, he may obtain leave from the court or a judge to issue execution on the judgment,—either as a matter of course (when the court or judge is satisfied that the right to execution has arisen), or (when the court or judge is not so satisfied), subject to the determination of any issue or question between the parties (xlii. 7).

Also, when judgment has been obtained against partners in the name of the partnership firm, an order may be made giving leave to issue execution against any person as a member of the firm (where the court or judge is satisfied that such person is a member of the firm), or (where the court or judge is not so satisfied) subject to the determination of any issue or question between the parties (xlii. 8). But upon such a judgment no such leave is requisite to issue execution,—either (1) against the partnership property; or (2) against any person who on the pleadings is admitted to be a partner, or who has been adjudged to be one; or (3) against any person who has failed to appear to the writ of summons served upon him as a partner (xlii. 8).

Immediately upon entry of judgment for any sum of money or for any costs (being first taxed), either *fi. fa.* or *elegit* may issue, in general; and by special order, such execution may issue even before entry of judgment (xlii. 15).

As between the original parties to the judgment, execution may issue at any time within six years after recovery of judgment (xlii. 18), and afterwards by leave of the court or a judge only (xlii. 19); and

although less than six years may have elapsed, if there has been any change by death or otherwise either in the parties entitled or in the parties liable to the execution, then an order of the court or a judge giving leave to issue the execution becomes necessary, and such order will be made immediately (if the court or a judge is satisfied that the applicant is entitled to it), or (if the court or a judge is not so satisfied) the order will be made, subject to any issue or question being first determined between the parties (xlii. 19).

No writ of attachment issues without the leave of the court or a judge, to be applied for on notice to the party (xliv. 2).

§ 108. *The Execution.—Leave to Renew and Renewal of.*—The writ (if once issued) holds good (if it remains unexecuted) for one year only after issue, but may (before it has expired) be renewed by leave of the court or a judge for one year more from the date of the renewal, and so on (xlii. 16).

The renewal is effected either by sealing the writ of execution itself with a renewal seal (xlii. 16), or by sealing with such seal a written notice of renewal signed by the party (or his solicitor), and delivering same, as so sealed, to the sheriff (xlii. 16).

§ 109. *The Execution.—Order to Stay.*—Immediately upon entry of judgment for any sum of money or for any costs (being first taxed), either *fi. fa.* or *elegit* may issue, in general; but by special order, either of such executions may be stayed until any time (xlii. 15). The application for the order to stay proceedings pending appeal is to be made in the first instance to the High Court (*A. G. v. Swansea Tramways*

*Co.*, 9 Ch. Div. 46, explaining *Cooper v. Cooper*, 2 Ch. Div. 492; and see *The Khedive*, W. N., 1879, 166), and is appealable.

And generally, upon the ground of facts which have arisen too late to be pleaded (and which would formerly have been the subject of a proceeding *audita querelâ*), any party liable to execution on any judgment given against him may have an order staying the execution (xlii. 22).

## SECTIONS 110–117.

### PROCEEDINGS IN CHAMBERS AND IN DISTRICT REGISTRIES, ALL BEING SUMMARY.

§ 110. *Chambers.*—*Modes of Proceeding in.*—Every application at Chambers is to be made by summons (liv. 1); and many people not parties to the action may have a right (or obtain leave) to attend proceedings in Chambers (*Sharp v. Lush*, 10 Ch. Div. 468).

§ 111. *Chambers.*—*References to and from, and Appeals from.*—The Chief Clerk (or the Master) may refer a matter to the Judge (being a matter which he thinks proper for the Judge), and the Judge may either decide the matter, or (which he rarely does) refer same back to the Chief Clerk (or Master) with directions (liv. 3).

In the Chancery Division, the applicant at Chambers has a right to bring the matter of his application before the Judge personally, so that, in that Division, there is no appeal (properly so called), but an instant reference from the Chief Clerk to the Judge at Chambers; but in the Common Law Divisions, appeal from order or decision of Master lies to Judge by summons, *i.e.*, at Chambers, within four days; either the Master or the Judge will extend time for this appeal (liv. 4). An

appeal or further appeal (as the case may be) lies from the Judge at Chambers to the court, on motion, within eight days (liv. 6), that is to say, orders (not being discretionary) made by any Judge at Chambers may be appealed or (as the case may be) further appealed by motion upon notice to the Judge in Court (in the Chancery Divisions) or to a Divisional Court (in the Common Law Divisions); and, thereafter, they become appealable to the Court of Appeal (Act 1873, § 50); and such orders may, by leave of the Judge, or of the Court of Appeal, be appealed direct from Chambers to the Court of Appeal (Act 1873, § 50; and see §§ 130-135, *infra*).

In the Chancery Division, the Court is in the habit of referring to Chambers the following matters:—

Generally, any matter (which in the Judge's opinion) can be more conveniently disposed of in Chambers (Master in Chancery Abolition Act, 1852, § 27), and particularly the prosecution of accounts and inquiries directed to be taken or made by any order in an action, and whether the same be the entire substance of the order, or only ancillary to working out the order; whether—

(1.) In action for administration of estate, or for execution of the trusts of a deed; or,

(2.) In actions of foreclosure or of redemption of mortgages; or,

(3.) In actions for partition of real estate, or for sale in lieu thereof; and so forth.

And conversely the Judge may adjourn from Chambers into Court any matter which, in his opinion, would be better heard in Court (Master in Chancery Abolition Act, 1852, § 27).

[In the Common Law Divisions, the following matters were taken in Chambers,—before a Master: Generally (under the “Despatch of Business Act,” 30 & 31 Vict., c. 68), such matters as the Judge at Chambers might himself attend to, other than matters relating to the liberty of the subject; and particularly, such matters as were prescribed in the *Regula Generalis* of Michaelmas Term, 1867, other than and except (unless by consent) the matters therein excepted (*Day’s Common Law Procedure*, 4th ed. pp. 527–528).]

§ 112. *Chambers.*—*Proceedings in.*—Wherever the rules of procedure express (and they do so *passim*) that any application may be made to the Court “or a Judge,” then if the application is made “to a Judge,” it may be made to him sitting at Chambers, and in that case it should be made by summons, supported in general with an affidavit or affidavits. The business transacted at Chambers by the Judge and his officers may be mapped out in the following manner:—

Any Judge of the High Court may (subject to any rules of court) exercise in Chambers all or any part of the jurisdiction by the Judicature Act vested in the High Court in respect of all such causes and matters, and in respect of all such proceedings in any causes and matters, as before the Judicature Act he might have heard in Chambers, or as he is or may be directed or authorised by any rules of court to hear in Chambers (Act 1873, § 39).

Under this general heading would fall the following applications:—

- (1.) Generally, all matters, which (without detriment to the public advantage) can be heard in Chambers (Master in Chancery Abolition Act, 1852, § 11; and Despatch of Business Act, 1867); and as (in Chancery) there is no distinction between the Judge and his Chief Clerk



like to that which exists (at Common Law) between a Judge and a Master, but every applicant in Chambers has a right to see the Judge himself upon no matter how trivial or how important an occasion, it is unnecessary to distinguish in the Chancery Division between matters to be transacted at Chambers before a Chief Clerk and those to be transacted there before the Judge; but, on the contrary, every proceeding in Chambers may, in the first instance, be taken before the Chief Clerk, and thereupon, either immediately or ultimately (if necessary), be referred to the Judge.

- (2.) Particularly, the following applications :—
- (a.) For extensions of time to plead, or to do any other act for which time is extendible.
  - (b.) For leave to amend the writ or pleadings.
  - (c.) For orders for production and inspection of documents, and for inspection of property.
  - (d.) For appointment of guardians *ad litem* in the case of infants and lunatics not so found, being defendants.
  - (e.) For leave to issue and to serve writ of summons out of jurisdiction.
  - (f.) For order to take ordinary account (xv. 2) where writ is expressly indorsed (under iii. 8) with claim for account.
  - (g.) For final judgment where writ is specially indorsed with particulars of debt or liquidated demand.

[But, in the Common Law Divisions there exists a real distinction between the Master and the Judge at Chambers, and an appeal properly so called lies (within four days) from the Master to the Judge, besides an immediate or ultimate reference; and under the Judicature Acts, 1873-75, it is provided that the Master

shall *not* have jurisdiction in the following particular matters; that is to say:—

- (1.) Matters relating to criminal proceedings or to the liberty of the subject;
- (2.) Removal of actions from one division or judge to another division or judge;
- (3.) The settlement of issues;
- (4.) Discovery by way of inspection of property (liv. 2, and 2*a*, November 1878);
- (5.) Appeals from District Registrars;
- (6.) Interpleader, where judgment is to be final and summary by consent, or when the matter being of less value than £50, the judgment is to be final and summary at the request of one of the parties (liv. 2*a*, November 1878);
- (7.) Prohibitions;
- (8.) Injunctions and other like interim orders;
- (9.) Awarding of costs;
- (10.) Reviewing taxation of costs; and
- (11.) Acknowledgments of married women.

*Nota Bene.*—By consent of the parties, the Master may settle issues (liv. 2), and may also grant discovery by way of inspection of property, and may exercise the summary final jurisdiction in interpleader (liv. 2*a*, November 1878); and without any such consent, he undertakes ordinary practice matters in interpleader (liv. 2), and may make orders *nisi* charging stock or shares (liv. 2*a*, November 1878), and may grant discovery otherwise than by inspection of property (liv. 2*a*, November 1878).]

*N.B.*—Many of the above particularised matters may be also done (and more usually are done) in Court, *i.e.*, upon motion, the Judicature Acts and Rules expressing in general that the application may be to the Court or a Judge, *i.e.*, in open Court or at

Chambers, although occasionally they prescribe an application by summons only (xiv. 1, 2; xv. 1, 2); the Court may, however, always check the improper use of motions instead of summonses by allowing only such costs of the motion as would have become payable if the proceeding had been taken by summons; but, *nota bene*, no foreclosure decree can be obtained on summons (*Lloyd v. David Lloyd & Co.*, 26 W. R., 572; 6 Ch. Div. 339).

§ 113. *District Registries.—Modes of Proceeding in.*—Every application to a District Register is to be by summons (xxxv. 5) with or without affidavits.

*District Registries.—References to and from, and Appeals from.*—The District Registrar may refer a matter to a judge (being a matter which he thinks proper for the judge), and the judge may either decide the matter, or refer same back to the District Registrar with directions (xxxv. 6),—every such reference to and by, being to and by the judge to whom the action is assigned (xxxv. 10). The court may also order any books or documents to be produced, or any accounts to be taken, or any inquiries to be made, in the District Registry or by the District Registrar. The result of the accounts and inquiries is to be reported by the District Registrar to the judge, who may or may not act upon the report (Act 1873, § 66).

Appeal from order or decision of District Registrar is to judge, within four days,—even in cases of jurisdiction by consent (xxxv. 7); either the District Registrar or the judge will extend time for this appeal (xxxv. 7).

§ 104. *District Registries.—Proceedings in.*—As above expressed, a writ of summons may in all Chancery actions issue out of any District Registry (§ 6.n., *supra*), and appearance thereto may also be entered in such

registry (§ 17.*n.*, *supra*). And where, from the appearance being there entered or otherwise, the action proceeds accordingly in the District Registry, and is not removed therefrom into the High Court (§ 115, *infra*), or by reason of some motion being made in the High Court the case is not thereby removed into the High Court (*Dyson v. Pickles*, W. N., 1879, p. 12), then the following proceedings (subject to the court or a judge otherwise ordering) may be taken in the District Registry, that is to say:—

All proceedings down to and including final judgment (where plaintiff entitled to enter same by consent or for default of appearance) (Act 1873, § 64), and down to and including order for account (where plaintiff entitled to enter same by consent or for default of appearance or of pleading), and down to and including interlocutory judgment (where plaintiff entitled to enter same for default of appearance (xiii. 6) or of pleading) (xxix. 4, 5), together with final judgment thereon (when damages assessed), may be taken in the District Registry,—subject always to the court otherwise ordering (xxxv. 1*a*); but wherever a judgment or order is not capable of being entered as aforesaid, but a trial or motion for same must first be had or made (*Irlam v. Irlam*, L. R. 2 Ch. Div. 608), then all proceedings down to and (in Chancery actions) inclusive of (Act 1873, § 64) but (in Common Law actions) exclusive of (xxxv. 1*a*) entry for trial. And all pleadings and other documents requiring to be filed are to be filed in the District Registry (xix. 29). All orders made by the District Registrar, and requiring to be entered (including all judgments by consent or by default as aforesaid) are to be entered in the District Registry; but judgments and orders made by a judge are entered in London, and merely an office copy thereof is filed in the District Registry (xxxv. 2); also, in a Chancery action, all certificates of the Chief Clerk and Taxing

Masters, and all affidavits and other documents (required to be filed) used in London before the judge in Chambers or before any Taxing Master or Referee of the court, and not already filed in the District Registry, are to be filed in the London office, and only office copies thereof are (if the judge directs) to be transmitted to the District Registry (xix. 29*a*, March 1879). Upon all judgments entered in the District Registry, costs may be taxed there also; and upon such judgment, and also upon all orders entered in the District Registry, execution may issue from the District Registry to enforce them (xxxv. 3). And for the purposes aforesaid, the District Registrar may exercise all the authorities of a judge at Chambers (xxxv. 4) other than and except in respect of the following matters; that is to say:—

- (1.) Matters affecting the liberty of the subject;
- (2.) Transfer of actions from division to division or from judge to judge;
- (3.) Prohibitions;
- (4.) Injunctions, whether under Act 1873, § 25, sub-sect. 8; or under lii. 1, 2, 3.
- (5.) Awarding costs in proceedings not before himself;
- (6.) Reviewing taxation of costs;
- (7.) Charging orders;
- (8.) Acknowledgments of married women; and,
- (9.) Leave for service of writs of summons or of notice in lieu thereof out of jurisdiction (xxxv. 4; and liv. 2 and 2*a*).

*Nota Bene*.—Order liv. 2*a*, November 1878, has no application, *semble*, to the District Registries, so as to enlarge their jurisdiction, like as the Master's jurisdiction has been thereby enlarged, *sed quære*.

§ 115. *District Registries*.—*Removal from, into High*

*Court.*—The District Registrar may refer to a judge of the High Court for his decision any matter arising in an action that is proceeding in the District Registry (xxxv. 6),—but this reference is scarcely a removal, as the matter comes back decided or with directions for its decision (xxxv. 6), and in the meantime the action has remained in the District Registry.

Removal, properly so called, from District Registry into High Court is authorised in the following cases :—

(1.) The removal is of right on the part of a defendant where the writ is not specially indorsed (xxxv. 11), unless the defendant asking removal is merely formal (xii. 5 ; xxxv. 12) ;

(2.) The removal is also of right on the part of a defendant (where writ of summons is specially indorsed under iii. 6) in either of the following cases :—

(a.) Where plaintiff within four days after appearance of defendant does not apply (under xiv. 1a) for an order to sign final judgment on affidavit of no defence (xxxv. 11) ; or

(b.) Where plaintiff has so applied, but defendant has obtained leave (under xiv. 5) to defend (xxxv. 11).

(3.) The removal is in the discretion of the court in all other cases, on the application of either plaintiff or defendant ; and apparently either the judge or the District Registrar may in this group of cases order the removal (xxxv. 13) ; but only the judge in the first and second groups, *supra* (Act 1873, § 65).

§ 116. *District Registries.*—*Removal into, from High Court.*—Any party to an action proceeding in London may obtain an order, but not as of right, from the court or judge to remove the action from the High

Court (*i.e.*, from London Chambers) into the District Registry (xxxv. 13).

§ 117. *District Registrars.*—*Jurisdiction of Court over.*—The District Registrar is an officer of the Supreme Court (in its High Court as well as its Appeal Court divisions), and as such is subject to the control of the court (Act 1875, § 13; xxxv. 9).

#### SECTIONS 118–126.

##### MOTIONS AND SUMMONSES.—THE VARIOUS PROCEEDINGS BY, ALL BEING SUMMARY.

§ 118. *Motions.*—*The Various Occasions for, in an Action.*—All applications to a Divisional Court or to a Judge in Court are to be made by motion (liii. 1); and all appeals to the Court of Appeal are likewise to be made by motion, being called appeal-motions when made in respect of any interlocutory order, and being called appeals simply when made in respect of any judgment, final or interlocutory (lviii. 2). All applications for a new trial are to be made by motion, and that *ex parte* in the first instance (xxxix. 1a), the motion being made to a Divisional Court where the trial has been before a Judge and Jury (*Davies v. Felix*, W. N., 1878, p. 210), and being made to the Court of Appeal where the trial has been before a Judge without a Jury (xxxix. 1, Dec. 1876) Judgment may also be obtained on motion; but this motion is properly called motion for judgment, at least in the general case.

But, besides these greater occasions for moving the Court, there are innumerable other occasions of a lesser but more constant character; that is to say:—

(1.) The interim preservation, detention, or custody of property (lii. 1, 3);

(2.) The sale of goods, &c., of a perishable, &c., character (lii. 2);

(3.) The prevention by injunction of certain wrongful acts (Act 1873, § 25, sub-sect. 8), wherever "just and convenient" that an injunction should issue (*Beddoes v. Beddoes*, 9 Ch. Div. 89; *Day v. Brownrigg*, 10 Ch. Div. 294; *Shaw v. Earl of Jersey*, 4 C. P. Div. 120; and distinguish *Crowle v. Russell*, 4 C. P. Div. 186);

(4.) The appointment of a receiver of estates (Act 1873, § 25, sub-sect. 8);

(5.) The dismissal of action for want of prosecution (xxix. 1; xxxvi. 4a); and,

(6.) The writ of attachment, application for (xliv. 2).

A *prima facie* case being made out by the applicant for any of the first four of these orders, the motion may be made at any time, and (in general) either by the plaintiff or by the defendant (lii. 4, 5).

§ 119. *Motions.*—*When they may be ex parte.*—Every motion for a rule or order to show cause in any action may be made *ex parte*, i.e., without notice to the other side (xxxix. 1a); but a rule or order to show cause is not to be granted in any action unless it is expressly authorised by the new rules of procedure (liii. 2), that is to say, upon motion for a new trial (xxxix. 1a), or for an order of revivor (l. 4; § 39, *supra*); or unless the rule or order is made in some proceeding "other than an action" (i. 3), and that course would have been previously the right course to take (*Re Phillips v. Gill*, L. R. 1 Q. B. Div. 78; *In re Landore Siemens Steel Co.*, 10 Ch. Div. 489). Also, plaintiff may move *ex parte* for an injunction or receiver, or both (lii. 4), although it is more usual in such cases to move upon notice; and no injunction should be granted



on *ex parte* motion, when there is a motion on notice pending (*Graham v. Campbell*, 7 Ch. Div. 490). Also, upon an application for a charging order on stock or shares (xlv. 1), the application is, in the first instance, *ex parte*, for an order to show cause only (1 & 2 Vict., c. 110, § 15); and so likewise upon an application for a garnishee order (xlv. 2). Also, where the motion should, in the ordinary case, be upon notice, a motion may be made *ex parte*, upon satisfying the Court or Judge that the delay which would arise from giving notice of motion would or might entail irreparable or serious mischief (liii. 3). Also, a motion may be *ex parte*, where, by the old practice, the rule or order would have been *ex parte* absolute in the first instance (liii. 3), subject, nevertheless, to any express provision in the New Rules of Procedure to the contrary, *e.g.*, rule for attachment for non-payment of costs on Master's allocatur was formerly *ex parte* absolute in first instance (*Chitty's Practice*, p. 1717), but every attachment is now obtainable on notice only (xlv. 2).

§ 120. *Motions.—Service of Notice of.*—Excepting in the cases specified in § 119, *supra*, in which motions may be made *ex parte*, *i.e.*, without notice, no motion is to be made without previous notice thereof to the other side (liii. 3; *Delmar v. Freemantle*, 3 Exch. Div. 237). The notice of motion is to name the day on which (or so soon thereafter as possible) it is intended to bring on the motion; and between the day so named and the service of the notice of motion, two clear days must intervene (liii. 4), but the Court may give special leave to serve the notice of motion for an earlier day (liii. 4), in which case the notice of motion is to mention that such special leave has been given. Where a defendant has been duly served with the writ of summons in any action and has appeared, the plaintiff's two days' notice of motion (or, with special leave, a shorter notice) may be served as a matter of

course; and where such a defendant has *not* appeared, and the eight days for appearance have expired, the plaintiff may, without any special leave, serve the two days' notice of motion (or, with special leave, a shorter notice) upon such defendant (liii. 7), and that either by merely filing same (xix. 6) or by personally serving same (*Whitaker v. Thurston*, W. N., 1876, p. 232). And by special leave (to be obtained *ex parte*) the plaintiff may serve any notice of motion (either the two days' notice or any shorter notice) along with the writ of summons, or at any time after service thereof, and before the time limited for the appearance of such defendant (liii. 8).

§ 121. *Motions.—Hearing of, and Evidence upon.*—The court may direct notice of the motion to be served upon some person or persons not already served therewith, and may for that purpose adjourn the hearing of the motion (liii. 5); or the court may (but rarely will) dismiss the motion summarily (liii. 5); and successive adjournments of the hearing may be (and, on various accounts, usually are) made (liii. 6).

The evidence on motion is taken by affidavit; and one of the commonest occasions for the adjournment of a motion is the desire of some or one of the parties to consider whether he may not be able to produce affidavits in answer to those upon which the motion professes to be made. The necessity (which occasionally arises) of cross-examination on the affidavits may also cause an adjournment of the hearing of the motion, it not being, in general, convenient to have such cross-examination taken in court.

§ 122. *Motions.—For Rule or Order to show Cause.*—No rule or order to show cause in an action is to be granted except in cases in which that mode of procedure is *expressly* authorised by the rules (Judicature

Acts, 1873-75, liii. 2). Consequently, a rule to show cause, upon a motion *ex parte* without notice, can be granted in the following cases only; that is to say:—

(1.) Upon an application for a new trial (xxxix. 1a), by motion to the Court of Appeal, where the trial has been by a judge without a jury (xxxix. 1, December 1876); or by motion to a divisional court, where the trial has been by a judge with a jury (xxxix. 1, December 1876), and that even in the case of a non-suit (*Elty v. Wilson*, 3 Exch. Div. 359), and even in the case of an action sent out of Chancery for trial by jury (*Hunt v. City of London Real Property Co.*, 3 Q. B. Div. 19), and an application to the wrong court will be dismissed (*Yetts v. Foster*, 3 C. P. Div. 437; *Davies v. Felix*, 4 Exch. Div. 32). Where the motion for a new trial is made to a divisional court (*i.e.*, in respect of a trial had before a judge and a jury), upon the ground that the judge has not submitted or left the issues to the jury, and directed the jury as to the law and evidence applicable to the case (Act 1875, § 22), the motion is made upon an exception (*i.e.*, objection) taken at the trial and entered upon or annexed to the record (if any), and where there is no record, then the ground of motion must be simply brought to the notice of the court (lviii. 13), by counsel upon the motion (with or without an affidavit of the objection or exception having been taken, or other means of showing same). And in either case, the motion being (in the first instance) *ex parte*, an order *nisi* can be made,—to which afterwards upon showing cause against a new trial the other side can object in the usual way. See also § 83, *Judgment.—On Motion for New Trial.*

(2.) Upon an application in any proceeding “other than an action” (i. 3), if a motion for such a rule or order would have been the correct course previously to the Judicature Acts, *e.g.*, in the matter of an arbitra-

tion (*Re Phillips v. Gill*, L. R. 1 Q. B. Div. 78); also, e.g., for transferring an action into Chancery after a winding-up order has been made (*In Re Landore Siemens Steel Co.*, 10 Ch. Div. 489); and so also, in the matter of solicitors to show cause why they should not be struck off the roll.

(3.) Upon an application for a charging order on stock and shares (xlvi. 1) belonging beneficially to any judgment debtor (1 & 2 Vict., c. 110, § 15); and

(4.) Upon an application for a garnishee order (xlv. 2).

§ 123. *Motions.*—*For particular Interlocutory Orders.*—An injunction (either mandatory or preventive) may be granted (or a receiver appointed), wherever just and convenient (*Beddoes v. Beddoes*, 9 Ch. Div. 89; *Day v. Brownrigg*, 10 Ch. Div. 294), by order at any stage in the action (Act 1873, § 25, sub-sect. 8), but it is not the practice of the court to grant a mandatory injunction before the trial; and a preventive injunction may be granted either before or at or after the hearing, wherever it is fit to grant same (*Noakes v. Noakes*, 4 P. Div. 60), and in such a case the fact of possession, or of claim of right, or any other (technical or substantial) ground of objection to the injunction carries no weight; but injunctions are, in these last-mentioned cases, invariably on terms (*Shaw v. Earl of Jersey*, 4 C. P. Div. 359), and are also usually until such and such a day or until further order (*Bolton v. London School Board*, 7 Ch. Div. 766), and in other cases injunctions may be granted either with or without terms (Act 1873, § 28, sub-sect. 8). The following particular interlocutory orders in the nature of injunctions (either mandatory or preventive) may also be made:—

(1.) An order for the preservation or interim custody of the subject-matter of litigation, when a *prima facie*

case of liability upon a defendant is made out, but such defendant claims to be relieved from the liability either wholly or partially (lii. 1).

(2.) An order for the sale of goods, wares, or merchandise,—as being either,

(a.) Of a perishable nature ; or

(b.) Likely to injure from keeping ; or

(c.) Desirable for other reasons to be sold (lii. 2 ; *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275) ;

(3.) An order for the preservation of property the subject-matter of the litigation generally (lii. 3 ; *Cash v. Parker*, 12 Ch. Div. 293) ;

(4.) An order for the detention of such property (lii. 3) ;

(5.) An order for the inspection of such property (lii. 3) ; and

(6.) An order for the restitution of property (other than land) to the applicant, when the applicant's title to the property is not disputed, but the person in possession of it claims a right of retention on the ground of lien or otherwise (lii. 6).

[*N.B.*—In this sixth case, money must be paid into court to answer the lien or other claim, before the order is made (lii. 6).]

The plaintiff may apply for the first of these particular interlocutory orders at any time after his right to such order appears on the pleadings (if any) ; and (if none) after his right to the order appears on any affidavits or otherwise (lii. 5).

As regards all other interlocutory orders, whether by way of injunction or otherwise, any party may apply for the order ; but if a defendant, he must first have appeared to the writ (lii. 4) ; and unless he is a plaintiff, he can only apply on notice, and the plaintiff him-

self should also (excepting in cases of emergency) apply on notice and not *ex parte* (lii. 4).

§ 124. *Motions.—Stay of Proceedings in lieu of Injunction.*—In lieu of obtaining an injunction from the Chancery Division to stay an action in a Common Law Division, the latter division will itself, in a proper case (*Crowle v. Russell*, 4 C. P. Div. 186), direct a stay of proceedings in the action, upon the motion of any person (who would have had a right to the injunction), whether such person is or is not a party to the action in the Common Law Division (Act 1873, § 24, sub-sect. 5).\*

§ 125. *Motions.—To Dismiss Action for Want of Prosecution.*—An order (subject, always, to the discretion of the court) may be made to dismiss a plaintiff's action (summarily before trial) in the following cases and upon the following grounds:—

(1.) For default (by plaintiff) in delivering a statement of claim, being bound to deliver one (xxix. 1; *Whistler v. Hancock*, 3 Q. B. Div. 83);

(2.) For non-compliance by plaintiff with an order to answer interrogatories or to grant discovery or inspection of documents (xxxi. 20);

(3.) For default (by plaintiff) for six weeks (or extended time, if any) after the close of the pleadings in giving notice of trial (xxxvi. 4a); and

(4.) For default (by plaintiff) to give security for costs when ordered to do so (*La Grange v. M'Andrew*, 4 Q. B. Div. 210).

§ 126. *Summonses.—The Various Occasions for, in an Action.*—All proceedings in an action, when the

---

\* The Court of Bankruptcy may still issue an injunction staying proceedings in any other court; and the Chancery Division may, in matters of Winding Up, do the like.

same are taken in Chambers or in the District Registry, are to be taken by summons (liv. 1 ; xxxv. 5).

The acts and rules in general leave it optional (in terms, at least) to take all proceedings of a summary kind incidental to the action in either of two ways, that is to say, either by motion or upon summons,—the phrase “by the court or a judge,” which occurs in the acts and in the rules *passim*, expressing that option. Nevertheless,—and in a Chancery action, at all events,—all such summary incidental proceedings, regarding which the procedure by motion or by summons is optional as aforesaid, should be taken upon summons and not by motion,—in the first instance, at least, seeing that in the Chancery Division it is the judge himself (either personally or by his agent, the Chief Clerk) that attends in Chambers, and a judge sitting in Chambers has all the authority of a judge sitting in court. But the parties must really exercise their own discretion in the matter,—*e.g.*, an order to make an affidavit of documents would never be applied for on *motion*, but only on summons ; and on the other hand, there are many matters incidental to an action in which not only is it more speedy, but it is simply proper and desirable to apply by motion, and it may even (from the gravity or intricacy of the matter) be occasionally necessary to apply by petition (2 Dan. Ch. Prac. 5th ed. p. 1434). *Seem*, a compromise arrived at in a pending action may be enforced therein by motion (*Scully v. Lord Macdonald*, 8 Ch. Div. 658) ; but it is sometimes necessary to bring an independent action for the purpose (*Gilbert v. Endean*, 9 Ch. Div. 259).

It is somewhat different, of course, in the Common Law Divisions, where the Master and the Judge are not (in substance) identical, and certain things are to be done by the Master, and certain others not (liv. 2 and 2*a*).

And as regards even Chancery actions, when these proceed in the District Registry,—it is quite true that the District Registrar is like a Common Law Master much more than like a Chief Clerk; and it is even expressly provided that the District Registrar (although otherwise able to do whatever a Judge at Chambers can do) shall not exercise any authority or jurisdiction which a Common Law Master is precluded from exercising (xxxv. 4 and liv. 2 and 2*a*).

In two instances, the acts or rules give no option between summons and motion, but prescribe a summons, viz. :—(1.) Applications for interlocutory order for an ordinary account where (under iii. 8) the writ is expressly indorsed with a claim for such account (xv. 2); and (2) Applications for final judgment where (under iii. 6) writ is specially indorsed in the case of a claim of debt or liquidated demand (xvi. 2). Also, a compromise arrived at in an action may be enforced on summons (*Eden v. Naish*, 7 Ch. Div. 781), but apparently might also be enforced on motion.

So also a defendant, after appearing to the writ of summons, if he is in a position to avail himself of interpleader, should take out a summons (before delivering any statement of defence) to compel the plaintiff and some third person to settle their respective claims between them, the defendant himself having no interest in the subject-matter of the litigation (i. 2). In this case, a motion to obtain an interpleader order would be a wholly mistaken course,—unless, perhaps, on very exceptional grounds.

On the other hand, in a great many instances, the acts or rules give no option between summons and motion, but prescribe a motion, and, of course, in these cases [as to which see §§ 118–125, *Motions*], there is no power of proceeding by summons. Neither can a



foreclosure decree be made on summons (*Lloyd v. David Lloyd & Co.*, 26 W. R., 572).

Besides the matters regarding which the acts or the rules permit or prescribe a summons, there are many other matters (of a summary kind incidental to an action) that may be taken by summons,—being in fact the proceedings which may be taken at Chambers (independently of the acts and rules) as specified in § 112, *Chambers—Proceedings in*.

#### SECTIONS 127–129.

##### COSTS.—PROVISIONS REGARDING, *GENERAL* AND *PARTICULAR*.

§ 127. *Costs.—General Provisions regarding.*—In general the costs as between party and party follow the event of every action in the court, subject to a general discretion in the court (lv.), which will only be exercised on sufficient grounds (*Harris v. Petherick*, 4 Q. B. Div. 611), and subject also (*quære*) to the provisions of certain particular statutes regarding costs, and subject, lastly, to the special provisions of the Judicature Act, 1873, or to the agreement of the parties (*Galatti v. Wakefield*, 4 Exch. Div. 249), regarding costs. And this rule holds good, even where there has been an order for a new trial, and on the new trial the judgment is the reverse of the former judgment (*Field v. G. N. Ry. Co.*, 3 Exch. Div. 261); also, where the plaintiff recovers the most trivial sum, as the balance after deducting defendant's counterclaim (*Potter v. Chambers*, 4 C. P. Div. 69; *Chatfield v. Sedgewick*, 4 C. P. Div. 383). The rule extends to all the costs "of and incident to" the action (*In re Brandreth's Trade Mark*, 9 Ch. Div. 618). A divisional court has original jurisdiction to deprive (for proper cause) a successful plaintiff of his costs of the

action, where no order regarding such costs is made at the trial (*Myers v. Defries*, 4 Exch. Div. 176; *Siddons v. Lawrence*, 4 Q. B. Div. 459).

Where costs are payable out of a particular estate or fund, the same may (according to circumstances) be (and that either of right or by special order) payable either as between solicitor and client or as between party and party; and as regards costs so payable, the right (where it exists) of any trustee, mortgagee, or other person to his costs is not affected by the Judicature Acts (lv.).

A successful appellant is entitled, in general, to the costs of the appeal and also to the costs in the court below,—as well his own costs there as also the costs which he may have paid to the other side under the adverse judgment. But where the court is divided in opinion, each party may be left to bear his own costs (*Anderson v. Morice*, 1 App. Ca. 713; *Pryce v. Monmouth, &c., Co.*, 4 App. Ca. 197).

§ 127a. *Costs.—Miscellaneous Provisions regarding.*—When a client employs an uncertificated solicitor, neither the solicitor nor the client can recover his costs, even when successful (*Re Fowler v. Monmouth, &c., Co.*, 4 Q. B. Div. 334). The costs of three counsel may or may not be allowed (*Kirkwood v. Webster*, 9 Ch. Div. 239); likewise the costs of shorthand writers' notes of evidence (*Bigsby v. Dickinson*, 4 Ch. Div. 24; *Kirkwood v. Webster*, 9 Ch. Div. 239); and apparently a special direction of the court is required for their allowance (*Ashworth v. Outram*, 9 Ch. Div. 483; *In re Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. Div. 307); and similarly on a reference (*Wells v. Mitcham Gas-light Co.*, 4 Exch. Div. 1). The costs of an abandoned motion must be paid in full (*Waddell v. Blockey*, 10 Ch. Div. 416), unless under exceptional

circumstances (*Norton v. L. & N. W. Ry. Co.*, 11 Ch. Div. 118); but the costs of an application to the court for these costs will not be allowed in general, unless payment has been demanded and refused (*Griffin v. Allen*, 10 Ch. Div. 913); so likewise the costs on a motion to commit for contempt (*Steele v. Hutchings*, W. N., 1879, p. 18). Refreshers to counsel (*Harrison v. Wearing*, 11 Ch. Div. 206) and costs of experts (the experts not exceeding three) may be allowed (*Stanger-Leathes v. Stanger-Leathes*, W. N., 1879, p. 86). An action may be brought to trial for the sake of costs only (*Storr v. Corporation of Maidstone*, W. N., 1878, p. 219); and upon a change of solicitors, no provision is made by the order as to costs (*Grant v. Holland*, 3 C. P. Div. 180). The payment of costs may be stayed pending appeal (*Grant v. Banque, &c.*, 3 C. P. Div. 202; *Adair v. Young*, 11 Ch. Div. 136), but usually is not (*Merry v. Nickalls*, L. R., 8 Ch. App. 205). Regarding costs when plaintiff succeeds in his action and defendant on his counter-claim, see *Staples v. Young*, 2 Exch. Div. 325; *Blake v. Appleyard*, 3 Exch. Div. 195; *Potter v. Chambers*, 4 Exch. Div. 69; *Saner v. Bilton*, 11 Ch. Div. 416. And as to whether solicitor's retainer is joint or several, see *In re Allen, Davies v. Chatwood*, 11 Ch. Div. 244. A plaintiff accepting money paid into court, in discharge of his action, may sign judgment for his costs (*Greaves v. Fleming*, 4 Q. B. Div. 226).

Security for costs (either in an action or on an appeal) is in the discretion of the court,—as to amount, as to time of giving, and in all other respects (Rule 7, Feb. 1876; lviii. 15); and this security may extend to *past* as well as to future costs (*Massey v. Allen*, W. N., 1879, p. 131). The application for security should first be made to the party out of court (*Ship "Constantia,"* W. N., 1879, p. 124). Appeals for costs alone do not lie (Act 1873, § 49), but appeals in respect of

costs, charges, and expenses, *semble*, do lie (*In re Chennell, Jones v. Chennell*, 8 Ch. Div. 492); also, an appeal lies regarding any order of the court requiring or not requiring security for costs (*Northampton, &c., Co. v. Midland Wagon Co.*, 26 W. R., 485).

The usual grounds upon which security for costs has been ordered, are that the plaintiff's appeal is vexatious or such like, or that he has not paid the costs in the court below (*Usil v. Brearley*, 3 C. P. Div. 206; *Winterfield v. Bradnum*, 3 Q. B. Div. 324; *Hankin v. Turner*, 10 Ch. Div. 372; *Clarke v. Roche*, 25 W. R., 309), or that the plaintiff is merely formal (*Belmont v. Ayward*, 4 C. P. Div. 352), or is out of the jurisdiction (General Procedure), or is insolvent (*In re Ivory*, 10 Ch. Div. 372).

Security for costs, if desired, must be applied for without delay (*In re Musical Compositions, &c., ex parte Hutchins v. Romer*, W. N., 1879, p. 99), and must be given within a reasonable time (*Polini v. Gray*, 11 Ch. Div. 741).

§ 128. *Costs.—Particular Provisions regarding.*—There are various grounds for making a special order as to costs, and such grounds may be conveniently classified as under:—

I. Independently of the Judicature Acts and rules, *i.e.*, by certain rules of equity (and of law) not depending on statute, and not affected by any particular statute or by the Judicature Acts,—

When a party succeeds at the trial or hearing (or upon motion for judgment), but upon evidence which is not strictly consistent with his pleadings (*Ex parte Cooper, In re Baum*, 10 Ch. Div. 313), so that these want amendment at the trial, the court gives him no costs, and sometimes even requires him to pay the extra costs attributable to his faulty pleadings or

general faulty conduct of the case (*Evans v. Davis*, 10 Ch. Div. 747; *Child v. Stenning*, 11 Ch. Div. 82).

Also, in certain cases, *e.g.*, actions for foreclosure or redemption, the costs of the action are added to the principal sum due on the security, as a matter of course, whether the mortgagee is plaintiff or is defendant.

Also, in administration actions, and in actions for the execution of the trusts of a deed, a trustee or executor's costs are paid as between solicitor and client, and out of the estate, and in preference (usually) to any other costs coming thereout; yet he may be deprived of his costs, and even ordered to pay costs (*Hamer v. Giles*, 11 Ch. Div. 942).

II. Under the provisions of particular statutes not affected (or else affirmed) by the Judicature Acts.—Various special provisions regarding costs are contained in particular statutes, *e.g.*, in the County Courts Act, 1867 (§§ 5, 7, 8, 10), and these provisions, *semble*, have been affirmed and continued by the Judicature Acts (Act 1873, § 67), notwithstanding the decisions in *Garnett v. Bradley*, 3 App. Ca. 944; *Ex parte Mercers' Co.*, 10 Ch. Div. 481; and *Parsons v. Tinsling*, 2 C. P. Div. 119. These last-mentioned provisions are briefly to the following effect:—

(1.) As to actions in the High Court, which lay in the County Court, no costs when £20 or under recovered on contract, or £10 or under recovered in tort, unless certificate for costs annexed to record, or judge in chambers allows costs (§ 5);

(2.) As to actions removed from the High Court into the County Court, costs prior to removal upon the High Court scale, and subsequent to the removal upon the County Court scale (§ 7),—applicable to actions on contract only, where amount claimed is or is reduced to £50

or under; but the like taxation of costs where action for malicious prosecution, &c., removed into the County Court (§ 10).

*Nota Bene.*—Detinue is (for this purpose) tort (*Bryant v. Hubert*, 3 C. P. Div. 389; and see *Pontifex v. Midland Ry. Co.*, 3 Q. B. Div. 23; *Fleming v. M. S. & L. Ry. Co.*, 4 Q. B. Div. 81).

III. Under the express provisions of the Judicature Acts and Rules alone,—

(1.) Needless prolixity or divergence from the prescribed forms in writs of summons (ii. 2), in pleadings (xix. 2), is visited with costs.

(2.) Mis-joinder or non-joinder of parties (xvi. 1), and improper joinder of actions (xvii. 9), are also visited with costs.

(3.) An unnecessary statement of claim (xxi. 1c), or a foolishly hostile statement of defence (xxii. 4), or a frivolous demurrer (xxviii. 2), may be visited with costs.

(4.) Amendments (at unseasonable times or in unreasonable and inconsistent ways) are visited with costs (xxvii. 4, 6; xxviii. 7; *Blackmore v. Edwards*, W. N., 1879, p. 175).

(5.) Demurrers, when overruled, oblige the demurring party to pay costs, unless the court should otherwise direct (xxviii. 11); and demurrers, whether to the whole or to part of the action, when they are allowed, oblige the party whose pleading is demurred to, to pay costs, unless the court should otherwise direct (xxviii. 6, 8, 9).

(6.) Want of prosecution, where action is dismissed for, obliges the plaintiff to pay costs (xxix. 1, 2).

(7.) Interrogatories of an unreasonable, vexatious, or unduly lengthy character are visited with costs (xxxi. 2).

(8.) Admissions of documents, unreasonable refusal to make, lays the party refusing open to the probability

of having the costs of the proofs thereof to pay, even though he should be successful (xxxii. 2).

(9.) Affidavits which unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, and, *à fortiori*, scandalous matter (*Cracknall v. Janson*, 11 Ch. Div. 1), may have to be paid for by the party filing same (xxxvii. 3).

(10.) Judgment of non-suit may (in a proper case) be set aside, but usually upon payment of costs (xli. 6).

(11.) Execution, leave to issue, where such leave necessary, will (if granted) be granted usually upon payment of the costs (xlii. 19).

(12.) Attachment of debts, the costs of, are entirely in the discretion of the court (xlv. 10); so also, attachment of person, costs of (lv. 1; *Abud v. Riches*, L. R. 2 Ch. Div. 528).

(13.) Appeals, cross notice of, when not given, is a ground slightly influencing the court in awarding costs of the appeal (lviii. 6; *Ralph v. Carrick*, 11 Ch. Div. 873).

(14.) And, *nota bene*, all the particular statutes confining the costs recoverable in actions of libel and slander to the amount of the damages recovered have been repealed by the Judicature Acts (*Garnett v. Bradley*, 3 App. Ca. 944); and that even in the case of inferior courts (*King v. Hawkesworth*, 4 Q. B. Div. 371); but the court may at the trial, or even subsequently thereto (*Bowey v. Bell*, 4 Q. B. Div. 95), entertain an application to deprive the plaintiff of his costs. And this repeal appears to be general (*Ex parte Mercers' Company*, 10 Ch. Div. 482).

§ 129. *Costs.—Taxation of.*—Various special rules (and orders) regarding taxation of costs have been issued from time to time under the Judicature Acts, especially,—the rules of August 1875 (relating to, among other things, special allowancès, *e.g.*, regarding scientific witnesses, *Mackley v. Chillingworth*, L. R. 2

C. P. Div. 273; *Turnbull v. Janson*, 3 C. P. Div. 264); the order as to court fees, October 1875; the order as to taking fees by stamps, October 1875; the order as to fees and percentages, April 1876; the order as to fees of official referees, April 1877; and the order as to fees in Manchester and Liverpool District Registries, October 1877. Such taxation may be on either the higher or the lower scale (*In re Sanderson*, 7 Ch. Div. 176; *Rogers v. Jones*, 7 Ch. Div. 345); and may be even after payment, but only under special circumstances (*In re Heritage*, 3 Q. B. Div. 726; *Watson v. Rodwell*, 11 Ch. Div. 150); see also § 127*a*, *supra*.

#### SECTIONS 130-135.

##### APPEALS.—THE PROCEEDINGS UPON, AS WELL *FORMAL* AS *SUMMARY*.

§ 130. *Appeals.—Varieties of.*—Every judgment (whether final or interlocutory), and also every order, is appealable to the Court of Appeal (Act 1873, § 19), unless where the Judicature Acts or any other Acts exclude the right of appeal or declare the judgment or order to be final or without appeal (Appellate Jurisdiction Act, 1876, § 20); and every judgment (whether final or interlocutory), and also every order of the Court of Appeal, is appealable to the House of Lords (Appellate Jurisdiction Act, 1876, § 3), but as regards Scotland and Ireland, only where error or appeal lay before the Appellate Jurisdiction Act, 1876. And there are two exceptions to appealable judgments or orders, viz.—(1.) Orders made by consent, and (2.) Orders as to costs merely, where the costs are matter of discretion (Act 1873, § 49)—these two exceptions are, however, appealable with the leave of the ordering judge (Act 1873, § 49).—The judgment of a Divisional Court of the High Court, consisting of not fewer than five judges, and acting as a court for Crown Cases



Reserved (11 & 12 Vict., c. 78), is not further appealable (Act 1873, § 47). Nor is any appeal allowed in a criminal cause or matter [not being to the last-mentioned Divisional Court upon a point reserved], excepting for some error of law apparent upon the record (Act 1873, § 47). Rehearings are abolished (*In re St. Nazaire Land Co.*, 12 Ch. Div. 88).

Appeals from Inferior Courts (Including County Courts) are to a Divisional Court of the High Court (Act 1873, § 45), and not further unless by leave of the Appeal Divisional Court (Act 1873, § 45).

Orders (not being discretionary) made by the Judge in Chambers, having been first moved upon notice, to be set aside or discharged by the Judge in Court (in the Chancery Division) or by a Divisional Court (in the Common Law Divisions), become thereafter appealable to the Court of Appeal (Act 1873, § 50); and such orders may, by leave of the Judge or of the Court of Appeal, be appealed direct from Chambers to the Court of Appeal (Act 1873, § 50). In such cases, either the judge should grant leave, or should certify that he does not want any further argument, or the Court of Appeal should be applied to, in order to set down the appeal without the judge's certificate (*Thomas v. Elsom*, L. R. 6 Ch. Div. 346).

A judgment of the Lord Mayor's Court is not appealable direct to the Court of Appeal (*Le Blanch v. Reuter's Telegraph Co.*, L. R. 1 Exch. Div. 408, being bad law), but is appealable in the first instance to the Divisional Court (*Appleford v. Judkins*, 3 C. P. Div. 489).

§ 131. *Appeal to Divisional Court of High Court.*—These appeals, when from County Courts, are,—

Either (1.) Upon a special case,—settled and signed in the County Court by the parties or by the County

Court Judge, and sealed with the seal of the County Court (see 13 & 14 Vict., c. 61, as to such special cases in common law matters; and 28 & 29 Vict., c. 99, as to such special cases in equity matters).

[*N.B.*—No evidence is rightly adduceable,—the appeal being grounded upon a mere point of law or upon some question of the rejection or mis-reception of evidence.]

[*N.B.*—Four days before the day appointed for argument of the special case, lodge two copies of the case at the Crown Office of the Queen's Bench Division, and they will be forwarded to the Divisional Court by the day (Notice, Feb. 1877.)]

Or (2.) By motion (38 & 39 Vict., c. 50, § 6).

[*N.B.*—No such motion can be made, unless a copy of County Court judge's notes signed by the judge is handed to the proper officer in court (Notice, Feb. 1877); and the points intended to be taken on the appeal must have been taken and defined before the County Court judge, so as to be embodied in his notes.]

[*N.B.*—The time for appealing by motion under 38 & 39 Vict., c. 50, § 6, is eight days, not extendible (*Tenant v. Rawlings*, 4 C. P. Div. 134); and for appealing by special case under 13 & 14 Vict., c. 61, and 28 & 29 Vict., c. 99, is thirty days.]

(See also § 3. *Divisional Court.*—*Matters for.*)

§ 132. *Appeal to the Court of Appeal.*—(1.) *Manner of Appealing.*—By simple notice of motion (lviii. 2), stating whether the appeal is from the whole or from some (and what ?) part only of the judgment or order.

(2.) *Notice of Appeal.*—*Service of.*—The notice is to be served on all parties directly affected by the appeal, but not (at least, unless so ordered by the Court of

Appeal) upon persons not so affected thereby (lviii. 3); the Court of Appeal may, in addition, direct service of the notice upon third persons not already parties (lviii. 3).

(3.) *Cross Appeal.*—*Notice.*—It is not necessary to give notice of motion by way of cross appeal, but if the respondent intend to ask upon the hearing of the appeal any variation in the decision appealed against, then he should notify that intention to the parties who will be affected by such variation if made (lviii. 6); but even such notification is not necessary, although (having regard to costs) it may occasionally (*The Lauretta*, 4 P. Div. 25) be expedient (lviii. 6).

(4.) *Notice of Appeal.*—*Amendment of.*—By leave of the Court of Appeal, and at any time (lviii. 3).

(5.) *Notice of Appeal.*—*Length of.*—From judgments (whether final or interlocutory), it is a fourteen days' notice, and from interlocutory orders, it is a four days' notice (lviii. 4). And as regards notice in lieu of notice by way of cross appeal from judgment (being final), it is an eight days' notice, and from interlocutory orders, it is a two days' notice (lviii. 7).

(6.) *Appeal.*—*Time for.*—From the refusal of an *ex parte* application,—four days from the refusal (lviii. 10).

From the refusal of an interlocutory application *on notice*,—twenty-one days from date of refusal (lviii. 15; *Dickson v. Harrison*, 11 Ch. Div. 243; and see *Berdan v. Birmingham Small Arms*, 7 Ch. Div. 24; *International, &c., Co. v. Moscow, &c., Co.*, 7 Ch. Div. 241; and for an extension of the time on the ground of mistake, compare *MacAndrew v. Barker*, 7 Ch. Div. 701, with *Rhodes v. Jenkins*, 7 Ch. Div. 711; and *Craig v. Phillips*, 7 Ch. Div. 249. But see *In re Mitchell's Trusts*, 9 Ch. Div. 5).

From the refusal of a judgment (final or interlocutory), one year from date of refusal (lviii. 15).

[This would include dismissal of action.]

From an interlocutory order,—twenty-one days from the signing and entering or otherwise perfecting of the order (lviii. 15).

*Nota Bene.*—This rule applies to a judge's finding without a jury of what is in fact a verdict, as distinct from the judgment given upon it (*Krehl v. Burrell*, 10 Ch. Div. 420; *Lowe v. Lowe*, 10 Ch. Div. 432); also, to an order to sign judgment (*Standard Discount Co. v. Otard de la Grange*, 3 C. P. Div. 67).

From a judgment (final or interlocutory),—one year from the signing and entering or otherwise perfecting of the judgment (lviii. 15).

[*N.B.*—Appeals from any order or decision,—

(a.) In winding up of companies,

(b.) In bankruptcy of individuals (*Ex parte Garrard*, 5 Ch. Div. 61; *Ex parte Cochrane*, 9 Ch. Div. 698; *Ex parte Wigg*, W. N., 1879, p. 101), and

(c.) In proceedings other than actions,—  
are limited to twenty-one days.

And the twenty-one days are to be reckoned,—

(a.) From the refusal of the order or decision, if refused; and

(b.) From the signing and entering or otherwise perfecting of the order or decision, if made (lviii. 9).

(7.) *Setting down Appeal.*—The appeal must be set down within the time named in the Notice of Appeal (*Re National Funds Assurance Co.*, L. R. 4 Ch. Div.

305; *Donovan v. Brown*, 4 Exch. Div. 148; distinguish *Goodbarne v. Fothergill*, 10 Ch. Div. 613). An appeal is set down,—

- (a.) If from refusal of judgment or order, by leaving notice of appeal simply; and
- (b.) If from judgment or order, by leaving same or office copy thereof, and also notice of appeal, with the Registrar (lviii. 8).

(8.) *The Judgment*.—Upon the hearing of an appeal, the court has power (after amending and receiving further evidence, if either should be necessary) to give any judgment and to make any order which ought to have been made, and also to make such further or other order as the case may require (lviii. 5); and the court may in so doing either go beyond or stay within the notice of appeal, and may even give such judgment or make such order in favour of all or any of the respondents, although they may not have given any cross appeal notice (lviii. 5). And the court is not to be prevented from so doing by any interlocutory order or rule from which there has been no appeal (lviii. 14). Further, if upon the hearing of an appeal from a judgment pronounced by a judge in court on the verdict or finding of a jury, or of a judge without a jury, it appears to the Court of Appeal that a new trial ought to be had, the court may direct a new trial (lviii. 5a, March 1879).

(9.) *The Costs of Appeal*.—The court may either as to the whole or as to any part of these costs make such order as is just (lviii. 5).

(10.) *The Execution*.—This is left to the High Court and to the division and judge thereof from whom the appeal was brought. Where the judgment or order of the Court of Appeal is given or made by virtue of any original jurisdiction of that court, and not by virtue of its appellate jurisdiction, then, *semble*,

the Court of Appeal (being a member of the Supreme Court) might grant execution, if the High Court should (in any such case) be unable to do so. But, *nota bene*, that the Court of Appeal has no original jurisdiction otherwise than as incidental to its appellate jurisdiction. Execution (where necessary) for the costs of the appeal likewise issues from the High Court.

§ 133. *Appeal to House of Lords.*—(1.) *What Judgments and Orders Appealable.*—Any order or judgment of the Court of Appeal is appealable to the House of Lords, but (as regards Scotland and Ireland) only where error or appeal would lie to the House before the 1st November 1876 (Appellate Jurisdiction Act, 1876, §§ 3, 12). The *fiat* or consent of the Attorney-General remains necessary, where it was necessary heretofore (Act 1876, § 10).

(2.) *Manner of Appealing.*—By petition (and not, as in the Court of Appeal, by motion), praying for a reviewal of the matter of the order or judgment appealed against (Act 1876, § 4); and no other manner of appealing to the House is permitted (Act 1876, § 11). The petition is to be signed by the appellant's two counsel (S. O., ii.), and is to be also certified by them to be a proper case for appeal (S. O., ii.).

(3.) *Time for Appealing.*—One year from the date of the order or judgment appealed from (S. O., i.); or one year after coming of age, or after discovery, or after becoming again *compos mentis*, or after getting out of prison, or (so only five years in all be not exceeded) one year after returning from abroad (S. O., i.).

(4.) *The Securities for Costs.*—One recognisance by self or substitute in the sum of £500, and either one joint and several bond of two sufficient sureties in the sum of £200, or else the deposit of £200 in the Court of Parliament (S. O., iv.).

(5.) *The "Form of Appeal."*—Consists of the petition of appeal with schedule thereto, accompanied with

the certificate of counsel and a certificate that a copy of the appeal, together with a notice that the appeal was going to be presented on the day specified in the notice, has been served on the respondents.

(6.) *The Appeal.—Presentation of.*—The “form of appeal” printed on parchment is to be lodged in the Parliament office for presentation, and an order will be thereafter made ordering the respondents to lodge their cases in answer. The order, with an indorsement thereon of due service thereof, is to be afterwards returned into the Parliament office within six weeks after the date of the presentation of the appeal (S. O., ii., v.).

(7.) *The Appearance of the Respondents.*—Any respondents intending to support the judgment or order appealed from, are to enter their appearances in the Appearance Book kept in the Parliament office (S. O., ii.).

(8.) *Lodging Printed Cases and Appendices.*—Six weeks (in English appeals) and eight weeks (in Scotch and Irish appeals) from the presentation of the appeal are allowed for the appellants and respondents respectively lodging these (S. O., ii.); the parties may agree upon a joint case with reasons *pro* and *contra*; the appendix is a print of all such parts of the evidence already used (including documents) as the appellant means to rely upon; and the respondent may add thereto additional documents also printed. The appellant delivers ten copies of appendix to the respondents, and lodges forty copies of his case and appendices in the Parliament office, and the respondent subsequently lodges ten more (S. O., ii.). If the respective periods of six weeks and eight weeks expire during the recess, these periods are extended to the third sitting day of the next ensuing meeting (S. O., vii.). And the periods may also otherwise be extended on petition.

(9.) *Setting down the Case.*—So soon as the printed cases (or case) and appendices have been lodged, either the appellants or the respondents may set the appeal

down for hearing,—the appellant doing so at latest on the first sitting day after the expiration of the six weeks aforesaid (in English appeals), and of the eight weeks aforesaid (in Scotch and Irish appeals); and if he fail to do so, either the respondent may set down the appeal on such first sitting day at latest, or the appeal will be dismissed (S. O., ii. v.). As to all (if any) of the respondents who have not entered an appearance, the appeal is set down *ex parte* upon proof of the service of the order aforesaid to appear.

(10.) *Cross-Appeals*.—May be presented, and set down in like manner as, but within the times limited for, appeals (S. O., vi.).

(11.) *Supplemental Cases*.—Are to be lodged upon the death of any party, if the appeal is revived against the representatives of such party (S. O., viii.); and so likewise, where any party is added (S. O., viii.).

(12.) *Judgment*.—Upon hearing the Appeal Petition, the House is “to determine what of right and according to the law and custom of this realm ought to be done in the subject-matter of such appeal” (Act 1876, § 4).

(13.) *Costs*.—*Taxation and Recovery of*.—Where costs are given, the House may itself fix the amount, or its taxing officer will tax same, or the Clerk of the Parliaments will appoint some person to tax same, and will give a certificate of the taxed costs; and upon the order giving costs, with or without such certificate (as the case may require), the taxed costs are recoverable (S. O., x.).

(14.) *Execution*.—Where an appeal is allowed, the case is remitted to the Court below (*i.e.*, to the High Court) with such (if any) direction as may be necessary, and the judgment or order of the House would accordingly (at least, in the general case) be executed in the High Court (*British Dynamite Co. v. Krebs*, 11 Ch. Div. 448). Execution (when necessary) for the costs of the appeal is by order of the House estreating the recognisance (*Callaghan v. Callaghan*, 8 Cl. & Fin. 709).



(See Denison and Scott's House of Lord's Appeal Practice.)

§ 134. *The Evidence.—On Appeals.*—Firstly, when appeal is to the Court of Appeal,—

(a.) Evidence *already given* in the High Court is brought before the Court of Appeal, in general, as follows :—

(aa.) Affidavit evidence,—by printed copies of affidavits already printed; and by office copies of affidavits not already printed;

(bb.) Evidence taken *vivâ voce*,—by copy of judge's notes, or by such other means (usually shorthand writer's notes) as the Court thinks expedient.

*N.B.*—Shorthand writer's notes are usually (but not necessarily) printed; and the cost of so taking and also of so printing them may, in a proper case, be allowed (lviii. 12; *Bigsby v. Dickinson*, L. R. 4 Ch. Div. 24); but a special direction is necessary (*Ashworth v. Outram*, 9 Ch. Div. 483).

(b.) *Further evidence, i.e.*, evidence additional to that already given in the High Court, may be brought before the Court of Appeal, in general, as follows :—

(aa.) Upon interlocutory orders appealed from,—further evidence (of facts arisen either before or since the order appealed from) by affidavit or by *vivâ voce* examination in the Court of Appeal, or by deposition taken before an examiner or commissioner (lviii. 5);

(bb.) Upon judgments (final or interlocutory) appealed from,—further evidence,—of facts arisen *before* the decision appealed

from, with leave; and of facts arisen *since* the decision appealed from, without leave,—by affidavit or by *vivâ voce* examination in the Court of Appeal or by deposition taken before an examiner or commissioner (lviii. 5).

Secondly, when appeal is to the House of Lords, the evidence is contained in the printed appendices scheduled to the Petition of Appeal.

§ 135. *Appeals.—Stay of Proceedings Pending.*—An appeal from a master's decision operates no stay of proceedings unless and so far as the master (or a judge) otherwise orders (liv. 5). An appeal from a District Registrar's decision operates no stay of proceedings unless and so far as the District Registrar (or a judge) otherwise orders (xxxv. 8). An appeal to the Court of Appeal operates no stay of execution or of proceedings under the decision appealed from (lviii. 16), all intermediate acts and proceedings holding good, unless otherwise ordered by the Court of Appeal (*Adair v. Young*, 11 Ch. Div. 136), or by the Court appealed from, or any judge thereof (lviii. 16); the application to stay is to be first made in the court appealed from (lviii. 17). But an order to show cause (when a motion *ex parte* for a new trial) operates a stay of proceedings in the action,—unless (and excepting so far as) the court upon granting the rule shall otherwise order (xxxix. 5).

#### SECTIONS 136, 137.

##### TIME.—PROVISIONS REGARDING, *GENERAL* AND *PARTICULAR.*

§ 136. *Time.—General Provisions Regarding.*—Month means calendar month, unless expressed to be

lunar month (lvii. 2). Sunday, Christmas Day, and Good Friday are not reckoned, when the time limited for doing any act or taking any proceeding is less than six days (lvii. 2); but Sundays, Christmas Day, and Good Friday are reckoned, when the time limited is six days or more,—excepting to this extent, viz., if the time limited expires with a Sunday, then the act or proceeding may be done or taken on the Monday (lvii. 3), or if the time limited expires with a day on which the offices of the court are closed,\* then the act or proceeding may be done or taken on the day that the offices are next open (lvii. 3). And in particular, as regards the Long Vacation, being from 10th August to 24th October (both days inclusive), (lxi. 2, 3), it is not reckoned (unless the court specially orders to the contrary) in counting the time within which pleadings are to be filed, amended, or delivered (lvii. 5); and, in fact, no pleading is to be (unless the court specially orders it to be) either amended or delivered during the Long Vacation (lvii. 4; *Chapman v. Real Property Trust, Limited*, 7 Ch. Div. 732). The court or a judge has a general power of enlarging or abridging the time appointed by the rules for the doing any act or the taking any proceeding (lvii. 6), and usually upon terms.

The division of the legal year into terms is abolished (Act 1873, § 26); but where the old terms were used as a measure for determining the time at or within which any act was to be done, they continue to be so used, unless and until they are superseded and so far as they are not superseded by other provisions in the like behalf (Act 1873, § 26; *College of Christ v. Martin*, 3 Q. B. Div. 16) [see also § 97, *supra*].

---

\* The offices of the court are closed on Sundays, Good Friday, Easter Monday, Easter Tuesday, Whit Monday, Christmas Day, the working day next following Christmas Day, and all days specially appointed by royal proclamation as days of general fasting, humiliation, or thanksgiving (lxi. 4).

§ 137. *Time.—Particular Provisions Regarding.*

I. The regular or formal and usual stages.

*Writ of Summons.*—Good for one year only, unless renewed, and if renewed then for six months at a time (viii. 1). Service of writ, at any time while current, is good.

*Appearance of Defendant to Writ.*—Normal period eight days after service of writ, or other the time specified in the writ; but any time before judgment will do.

*Plaintiff's Statement of Claim.*—Delivery of, to be within six weeks after defendant's appearance to writ (xxi. 1).

*Defendant's Statement of Defence* (with or without counter-claim).—Delivery of, to be within eight days after delivery of plaintiff's statement of claim (xxii. 1); and where no statement of claim delivered by plaintiff because defendant has stated that he does not require one, then within eight days after normal period for defendant's appearance to writ (xxii. 2).

*N.B.*—If defence is by *Demurrer*, the time is the same (xxviii. 3).

*Plaintiff's Reply.*—Delivery of, to be within three weeks after delivery of defendant's statement of defence (xxiv. 1).

*N.B.*—If reply is by *Demurrer*, the time is the same (xxviii. 3).

*Defendant's (or Plaintiff's) Pleading subsequent to Reply.*—Delivery of to be within four days (normal period) after delivery of last preceding pleading (xxiv. 3).

*N.B.*—If any pleading subsequent to reply is by *Demurrer*, the time is the same (xxviii. 3).

*Demurrer, Entry for Argument.*—Within ten days after delivery (xxviii. 6), otherwise demurrer is good.

*Evidence by Affidavit.*—(Where evidence so taken by consent.) Delivery of plaintiff's affidavits, within fourteen days after consent (xxxviii. 1); delivery of defendant's affidavits, within fourteen days after delivery of plaintiff's (xxxviii. 2); delivery of plaintiff's affidavits in reply, within seven days after delivery of defendant's (xxxviii. 3).

*N.B.*—These times may be (and in general should be) specially agreed upon, in the written consent to take the evidence by affidavit, or the court may be asked to extend same (xxxviii. 1, 2).

*N.B.*—If the evidence is to be taken *vivâ voce* at the hearing or trial, then each party prepares his own proofs in time for the hearing or trial simply.

*Cross-Examination on Affidavits.*—Notice for delivery of, to be within fourteen days after delivery of plaintiff's affidavits in reply (xxxviii. 4); but the Court may specially appoint any other time (xxxviii. 4). On trial of action or at hearing.

*N.B.*—If the evidence in chief is taken *vivâ voce* at the trial, then the cross-examination (if any) follows immediately upon the examination in chief, and then the re-examination (if any) follows upon such cross-examination immediately.

*Notice of Trial.*—Delivery of, by plaintiff with his reply (being a simple joinder of issue), or within six weeks after delivery of such a reply (xxxvi. 4); and after the expiration of such six weeks, either plaintiff or defendant may give the notice at any time, whichever of them is first in so doing (xxxvi. 4).

*Motion for Judgment.*—Action to be set down on, at any time within one year from the time at which the right to set down arose (xl. 9), but usually within ten days from such time (xl. 3, 7); and the ten days' limit is the extreme limit when leave to move reserved at trial (xl. 2).

*Judgment, Entry of.*—As soon as the successful party is ready, and (where judgment is conditional) upon the condition being fulfilled (xli. 4, 5). The judgment when pronounced by or in court bears date the day it is so pronounced (xli. 2).

*New Trial, Motion for.*—*Ex parte* applications for order or rule *nisi* to be made,—

(a.) Where trial has been in London or Middlesex within *four* days after trial, or on first day of next subsequent sitting of Divisional Court to hear motions (xxxix. 1a, March 1879).

(b.) Where trial has been elsewhere than in London or Middlesex, within first four days of next subsequent sittings, or within *seven* days after the last day of sitting on the circuits during which the action shall have been tried, if such day occurs during or within a week immediately before a vacation (xxxix. 1a, March 1879).

*N.B.*—Rule or order to show cause obtained on this motion is to be served within four days from its date (xxxix. 2); and cause is to be shown within eight days after date of rule or order (xxxix. 1a).

*Appeal.*—From master at Chambers to judge at Chambers, four days (*Gibbons v. L. F. Association*, 4 C. P. Div. 263).

*Appeal.*—From judge at Chambers to court, twenty-one days in Chancery (lviii. 15, as applied in

*Dickson v. Harrison*, 9 Ch. Div. 243); and eight days in Common Law Divisions (liv. 6, March 1879).

*Appeal, Notice of Motion for.*—Delivery of at any time within one year whether judgment is final or is interlocutory—to be computed (where judgment is refused) from date of refusal, and (where judgment is given for plaintiff or applicant) from the date the judgment is drawn up and entered (lviii. 15). The appeal-notice must be a fourteen days' notice (lviii. 4), and notice (if any) of cross-appeal an eight days' notice (lviii. 7). To Court of Appeal.

[*N.B.*—Interlocutory orders are to be appealed within twenty-one days; see *infra*, the 2d branch of this section,—“The Incidental or Summary and Occasional Stages.”]

*Appeal, Petition of.*—Must be lodged in the Parliament office for presentation to the House of Lords within one year from the date of the judgment or order appealed from (App. Jur. Act, 1876, S. O., i.); and the appeal case (or cases), together with the appendices thereto, must be lodged in the same office within six weeks (in the Case of English appeals) and eight weeks (in the case of Scotch and Irish appeals), from date of presentation of appeal (S. O., v.). But as regards appeals to the House of Lords, the year for appealing is reckoned (in cases of disability) from the time of attaining full age (in the case of infants), from the time of becoming discovert (in the case of married women), from the time of becoming *compos mentis* (in the case of *non compos mentis*), and from getting out from prison (in the case of persons in prison), and from returning from abroad (in the case of persons abroad), excepting that in the case of persons abroad, no further time than *five* years in all is to be allowed for appealing (S. O., i.). To House of Lords.

II. The incidental or summary and occasional stages.

*Writ of summons.*

(a.) *Concurrent Writ.*—May issue within twelve months from issue of original writ (vi. 1).

(b.) *Renewed Writ.*—Writ may be renewed for six months successively, each renewal to be made while original writ (either itself, or as previously renewed) is current (viii. 1).

(c.) *Amendment of.*—With leave, at any time, and in any respect or respects (iii. 2 ; xxvii. 11).

(d.) *Amended Writ, Issue and Service of.*—Like original writ (xvi. 15).

*Appearance of Defendant to Amended Writ.*—Where party added as Defendant.—Normal period eight days after service of amended writ, or other the time specified in the amended writ (xvi. 13) ; but any time before judgment will do.

*Plaintiff's Statement of Claim.*

(a.) *Extension of Time to Deliver.*—The normal period of six weeks for delivery of statement of claim may be extended (xxi. 1).

(b.) *Amendment of.*—The statement may be amended once without leave at any time within three weeks after delivery of defendant's statement of defence, plaintiff not having meanwhile replied thereto (xxvii. 2), and (when no statement of defence has been delivered, then) within four weeks after appearance of last appearing defendant (xxvii. 2) ; and at any later time with leave (xxvii. 7).

*N.B.*—Amendments under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

(c.) *Delivery of Amended Statement of Claim.*—Where amendment made, the amended statement of



claim must be delivered to persons already parties within the time for amending same (xxvii. 10) and to persons made for the first time parties by the amendment within four days after the appearance of such parties (xvi. 16) to the amended writ of summons as served upon them (xvi. 16).

(d.) *Re-amendment of.*—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 5, 6).

(e.) *Amendments, Disallowance of.*—Applications to disallow amendments made without leave must be made within eight days after delivery of the amended statement of claim (xxvii. 4).

*Defendant's Statement of Defence with or without Counter-claim.*

(a.) *Extension of Time to Deliver.*—The normal period of eight days for delivery of statement of defence may be extended (xxii. 1).

(b.) *Amendment of.*

(1.) If simple defence (without counter-claim), amend same with leave at any time, and without leave not at all (xxvii. 5, 6);

(2.) If defence with counter-claim, — amend counter-claim once without leave at any time within four days after delivery of plaintiff's reply, defendant not having meanwhile pleaded to such reply (xxvii. 3), and (where no reply has been delivered, then) within twenty-eight days from delivery of defence (xxvii. 3); and at any later time with leave (xxvii. 1).

*N.B.*—Amendments under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

- (c.) *Delivery of Amended Statement of Defence.*—Where amendment made, the amended statement of defence must be delivered to persons already parties within the time for amending same (xxvii. 10); and to persons who by the amendment are made for the first time parties within, *semble*, the like time.
- (d.) *Re-Amendment of.*—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 5, 6).
- (e.) *Amendments, Disallowance of.*—Applications to disallow amendments made without leave must be made within eight days after delivery of the amended statement of defence and counter-claim (xxvii. 4).

*Plaintiff's Reply.*

(a.) *Extension of Time to Deliver.*—The normal period of three weeks for delivery of reply may be extended (xxii. 1).

(b.) *Amendment of.*—Amend same with leave at any time, and without leave not at all (xxvii. 5, 6).

*N.B.*—Amendments under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

(c.) *Delivery of Amended Reply.*—Where amendment made, the amended reply must be delivered within the time for amending same (xxvii. 10).

(d.) *Re-Amendment of.*—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 5, 6).

*Third Party's Reply (being his Defence) to Counter-*

*claim.*—Must be delivered within eight days (extendible) after third party has been served with counter-claim (xxii. 8); but, no doubt, this reply will be allowed the same indulgences by way of extension of time to deliver, and by way of amendment and re-amendment of, as the defendant's statement of defence is allowed to have, as explained *supra*.

*Defendant's Further Defence.*—Of matter arisen since delivery of statement of defence, or of amended statement of defence,—by leave only, and to be delivered within eight days after the matter arisen (xx. 2).

*N.B.*—Matter arisen subsequent to writ issued, may, without leave, be included in statement of defence (xx. 2).

*N.B.*—In either case, plaintiff may deliver a confession of the Further Defence or Defence, and sign judgment for his costs up to the time of the delivery of such Further Defence or Defence (xx. 3).

*Plaintiff's Further Reply.*—Of matter arisen since delivery of reply,—by leave only, and to be delivered within eight days after matter arisen (xx. 2).

*N.B.*—Matter arisen subsequent to delivery of statement of defence, may, without leave, be included in reply (xx. 2).

*Third Party's Further Reply*, (being his *Further Defence to Counter-claim*), *semble*, like *Defendant's Further Defence*, *supra*.

*Pleadings Subsequent to Reply.*—And which (being other than a simple joinder of issue) are by leave only (xxiv. 2), are to be delivered within four days after the delivery of the previous pleading (xxiv. 3).

(a.) *Extension of Time to Deliver.*—But the normal period of four days may be extended (xxiv. 3).

(b.) *Amendment of.*—Amend same with leave at any time, and without leave not at all (xxvii. 6).

*N.B.*—Amendments made under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

(c.) *Delivery of.*—Where amendment made, the amended pleading must be delivered within the time for amending same (xxvii. 10).

(d.) *Re-amendment of.*—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 6).

*Demurrer.*—*Entry for Argument.*—Ut supra.

*Evidence by Affidavit.*—Ut supra.

*Cross-examination on Affidavits.*—Ut supra.

*Notice of Trial.*—Ut supra.

*Motion for Judgment.*—Ut supra.

*New Trial.*—*Motion for.*—Ut supra.

*Appeal.*—*Notice of Motion for.*—Ut supra.

*Appeal.*—*Petition of.*—Ut supra.

*Summonses.*—Usually two clear days' service of,—but shorter by leave.

*Notices of Motion for Interlocutory Order.*—Usually two clear days' service of,—but shorter by leave (liii. 4).

*Appeals from Interlocutory Orders.*—The notice of appeal must be a four days' notice (lviii. 4), and must be given within twenty-one days from the order appealed from,—reckoning (in case of refusal of order)

from date of refusal, or (in case of grant of order) from entry thereof (lviii. 15). Any cross appeal notice is a two days' notice (lviii. 7).

*Nota Bene.*—That an order overruling (or allowing) a demurrer, although it is not an interlocutory order, is to be appealed as if it were an interlocutory order (*Trowell v. Shenton*, 8 Ch. Div. 318).

*Appeals from Refusal of Interlocutory Order ex parte.*  
—Must be brought within four days (lviii. 10).

*Appeal from District Registrar.*—Must be brought within four days (liv. 4).

*Appeal from Chambers to Judge.*—None in Chancery, but an immediate reference to judge in Chambers, and in Common Law, take out summons and make same returnable before the judge within four days from Master's decision (liv. 4; *Bell v. North Staffordshire Railway Co.*, 4 Q. B. Div. 205).

*Appeal from Judge at Chambers to Court.*—Twenty-one days (lviii. 15; as applied in *Dickson v. Harrison*, 9 Ch. Div. 243), in Chancery actions; and in Common Law Divisions, eight days (liv. 6, March 1879).

## § 138. TABULAR STATEMENT (IN ROUGH)

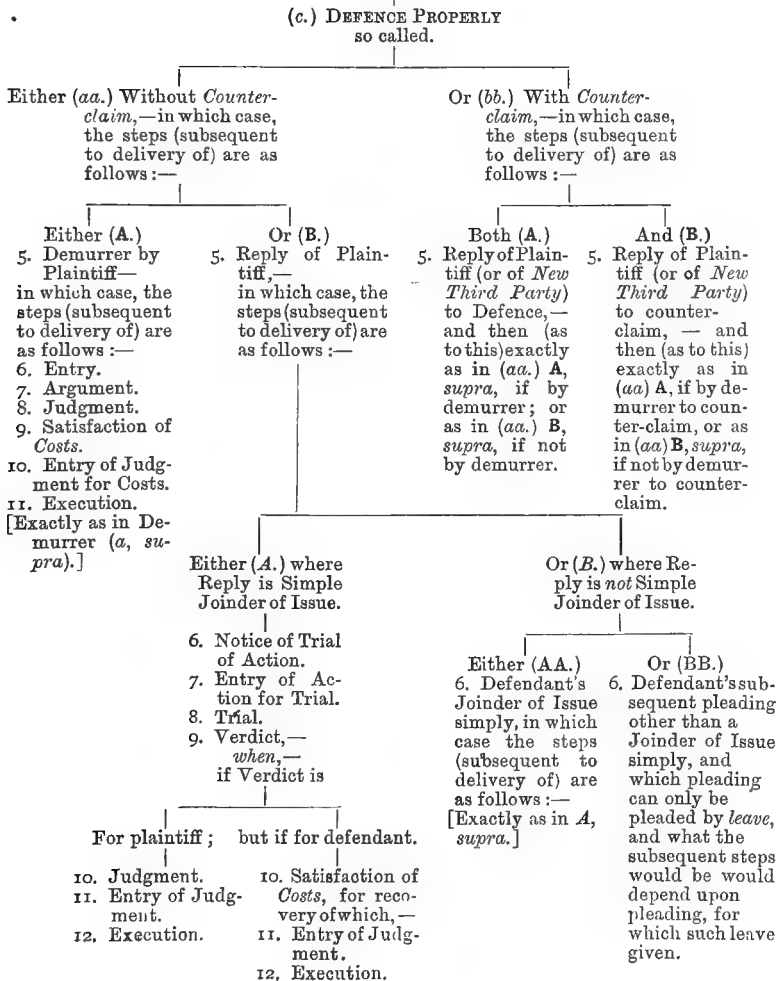
(Designed principally to show the Varying Course which the Action

1. THE WRIT.—PREPARATION, ISSUE, AND SERVICE OF.
2. THE APPEARANCE.—ENTRY OF.
3. PLAINTIFF'S STATEMENT OF CLAIM.—PREPARATION AND DELIVERY OF.
4. DEFENDANT'S STATEMENT OF DEFENCE.—PREPARATION AND DELIVERY OF.  
(in any of the following forms) :—

(a.) DEMURRER— In which case, the steps (subsequent to delivery of) are as follows :—	(b.) PLEA— In which case, the steps (subsequent to delivery of) are as follows :—
5. Entry of Demur- rer for Argu- ment, and notice of such entry to other side.	Either (aa.)
6. Argument of De- murrer.	5. Demurrer by Plaintiff,—in which case, the steps (subsequent to delivery of) are as follows :—
9. Judgment on De- murrer,— <i>when</i> , if overruled, subse- quent defence is by defence prop- erly so called ( <i>c. infra</i> ) ; but if allowed, and no liberty to amend, then—	6. Entry.
8. Satisfaction of <i>costs</i> , for recovery of which—	7. Argument.
9. Entry of Judg- ment.	8. Judgment.
10. Execution.	9. Satisfaction of <i>costs</i> .
	10. Entry of Judg- ment for <i>costs</i> .
	11. Execution.
	[Exactly as in De- murrer( <i>a. supra</i> ).]
	Or (bb.)
	5. Reply of Plain- tiff,—in which case, the steps (subsequent to delivery of) are as follows :—
	6. Notice of Trial of Plea.
	7. Entry of Action (Plea) for Trial.
	8. Trial.
	9. Verdict,— <i>when</i> , if verdict is
	For plaintiff ;
	but if for defendant
	10. Judgment.
	10. Satisfaction of <i>costs</i> , for recovery of which,—
	11. Entry of Judg- ment.
	11. Entry of Judg- ment.
	12. Execution.
	12. Execution.

## OF PROCEEDINGS IN AN ACTION.

*may pursue Subsequently to Delivery of Plaintiff's Statement of Claim.)*







# I.—INDEX

TO

## THE PRINCIPLES OF EQUITY.

---

### ACCIDENT—

Definition of, and illustration of, 420.

To give jurisdiction, there must be no complete legal remedy, and the party must have a conscientious title to relief, 421.

Courts of equity do not lose their jurisdiction because the common law courts have subsequently acquired it also, 421.

Cases in which relief is granted,—

(1.) Lost bonds, 422.

Originally no remedy at law, 422.

Equity can grant relief by requiring an indemnity, which a court of law could not do, 422-3.

Where discovery is sought, no affidavit is necessary unless relief also is asked, 423.

(2.) Lost deed, no ground for coming into equity, 424-5.

For law now gives and always gave relief, 424-5.

There must be special circumstances irremediable at law, 424-5.

Title-deed of land concealed by defendant, 424-5.

Deed lost when party in possession prays to be established in possession, 424-5.

Where plaintiff is out of possession, 424-5.

(3.) Lost negotiable instruments, 425.

(4.) Lost non-negotiable instruments, 425-6.

No remedy originally at law, 425.

17 & 18 Vict., c. 125, gives courts of law jurisdiction, 425-6.

(5.) Destroyed negotiable and non-negotiable instruments, 426.

(6.) Execution of power, 426-428.

Defective execution remedied, 426.

In whose favour, 426-7.

What defects are aided, 427-8.

Distinction between mere powers and powers in the nature of trusts, 428.

(7.) Accident in payment by executors or administrators, 428-9.

Executors protected in equity if they have acted with good faith and caution, 428.

ACCIDENT—(*continued.*)

They are gratuitous bailees, 428.

- (8.) Where master of minor bound apprentice becomes bankrupt, 429.

Cases in which relief is not granted,—

- (1.) In matters of positive contract, 430.  
Destruction of demised premises, 430.  
Party might have provided against the accident, 430.  
(2.) Contract where parties are equally innocent, 430.  
(3.) Where party claiming relief has been guilty of gross negligence, 430-1.  
(4.) Where other party has an equal equity, 431.

See EXTRINSIC EVIDENCE; MISTAKE.

## ACCOUNT—

Trustee entitled to have his accounts taken, 168-9.

Surcharging and falsifying, right of, 169, 510.

Origin of jurisdiction in, 505.

Where action of, lay at law, 505.

- (1.) In cases of privity of deed or law, 505.  
(2.) Between merchants, 505.

Suitors preferred equity because of its powers of discovery and administration, 505-6.

In what cases, equity allows account, 506.

- (1.) Principal against agent, 506-7.  
When agent may plead Statute of Limitations, 507.  
Agent cannot have an account against his principal, 507.  
In patent suits plaintiff must elect between account and damages, 507.  
(1a.) *Cestui que trust* against trustee, 507.  
(2.) Cases of mutual account between plaintiff and defendant, 507.  
As where each of two parties has received and paid on the other's account, 508.  
No account if it is a mere question of set-off, 508.  
(3.) Circumstances of great complication, 508.  
The test is—Can the accounts be examined on a trial at *Nisi Prius*? 508.  
Compulsory reference to arbitration by 17 & 18 Vict., c. 125, s. 3, and references under Judicature Acts, 509.

Matters of defence to suit for an account,—

- (a.) Settled account, 509.  
Equity will open the whole, if there be mistake or fraud, 509-510.  
In other cases particular items only will be examined, 510.  
Leave to surcharge and falsify, 510.  
What is a settled or stated account, 510.  
(b.) Laches, 510-11.

## ACQUIESCENCE—

Where owner of estate stands by, and permits improvements, 43.

*Vigilantibus non dormientibus æquitas subvenit*, 45.

Of *cestui que trust* in breach of trust, 168.

ADEMPTION OF LEGACY.—See SATISFACTION.

ADMINISTRATION OF ASSETS.—See ASSETS.

ADVANCEMENT—

Presumption of, as against resulting trust, 126-128.

In favour of the following persons :—

- (1.) Legitimate child, 126.
- (2.) Illegitimate child, 126.
- (3.) Persons treated as children, 126-127.
- (4.) Wife, being lawfully wedded, 127.

Not in favour of the following persons,—

- (1.) Kept mistress, 127.
- (2.) Deceased wife's sister unlawfully wedded, 127.
- (3.) Children of female purchaser, 128.

Presumption of, rebuttable by parol evidence, 128-129.

- (1.) Contemporaneous acts and declarations, 128-129.
- (2.) Subsequent acts and declarations, 129.

AGENT—

Notice to, effect of, on principal, 40, 41.

Cannot purchase estate of the principal, nor derive benefit from the estate of, 153.

Good faith and full disclosure necessary between principal and, 474.

Cannot make secret profit out of his agency, 474.

ALLOWANCES—

For payments by co-owner where same necessary and permanently beneficial, 142-3.

See also MORTGAGE.

ANTE-NUPTIAL AGREEMENT—

Must be in writing unless executed, 85.

Post-nuptial settlement in pursuance of, 85, 86.

ANTICIPATION, RESTRAINT ON.—See SEPARATE ESTATE.

APPOINTMENT.—See POWERS ; FRAUD IN EQUITY.

APPLICATION OF PURCHASE-MONEY.—See PURCHASE-MONEY.

APPROPRIATION.—See EQUITABLE ASSIGNMENT.

APPROPRIATION OF PAYMENTS—

What it is, 517.

Debtor has first right to appropriate payment to which debt he chooses at time of payment, 517-8.

If debtor omit, creditor may make appropriation, 518.

But not to an illegal debt, 518.

Creditor may appropriate to a debt barred by statute, 518.

But this will not revive a debt already barred, 519.

General payment by debtor takes a debt not already barred out of the statute, but does not revive one barred, 519.

If neither make appropriation, the law makes, 519.

Cases of running accounts in partnerships, 519-520.

Account is not to be taken backwards, and balance struck at head instead of foot, 520.

## APPROPRIATION OF SECURITIES—

Law of, 520, note.

## ARBITRATOR—

Agreement to refer to, when enforced, 497.

Compulsory reference to, by 17 & 18 Vict., c. 125, s. 3, 497.

Discovery in aid of reference to, 600.

Arbitrator cannot be compelled to state grounds of award, 600.

## ASSETS—

Distinction between legal and equitable, 260-262.

Refers to remedy of the creditor, 261.

Legal, those recoverable by the executor *virtute officii*, 261.

Importance of distinction between legal and equitable, formerly and at present, 261-262.

The order of priority in payment of debts out of *legal* assets, as regards deaths before 32 & 33 Vict., c. 46, 262-263.

The order of priority in payment of debts out of *equitable* assets, and also (under 32 & 33 Vict., c. 46) out of *legal* assets, 263.

Executor may prefer one creditor, unless decree, injunction, or receiver, 263-264.

Enumeration of legal, 264-265.

Varieties of equitable, 265.

(1.) By their own nature, enumeration of, 265-266.

(a.) Property actually appointed in exercise of general power, 265-266.

(b.) Separate estate of married women, 266.

(2.) By act of testator, enumeration of, 266.

Charge of debts distinguished from a trust, 266-267.

In a trust for payment of debts lapse of time no bar, 266-267.

Except as to personal estate, 266-267.

In a charge creditors may be barred by lapse of time, 266-267.

What amounts to a charge of debts, 267.

General direction by testator for payment of his debts, 267-268.

Except where testator has specified a particular fund, 268.

Or where executors, not also devisees, are directed to pay the debts, 268.

Debts to be paid out of rents and profits, 268.

Lien on land not affected by a charge of debts, 268-269.

Neither specialty nor simple contract debts are a lien on the lands, 269.

Administration under Judicature Act (1875), 262-270.

Rights of secured creditors assimilated to those in bankruptcy, 270.

Who is and who is not a secured creditor, 270.

Extent of application of section 10, Act 1875, 270-271.

Legatees postponed to creditors, 271.

Order of liability of different properties of testator, 271-272.

(1.) The general personal estate, primary liability of, 272.

What exonerates the personalty, 272.

Not a general charge or express trust of realty, 273.

Not even if funeral and testamentary expenses are charged on realty, 273.

Unless personalty be given at same time as a specific legacy, 273.

Case of mortgage-debts.—See EXONERATION; LOCKE KING'S ACT; MORTGAGES.

**ASSETS—(continued.)**

- (2.) Lands expressly devised for payment of debts, equitable, 279.
- (3.) Realty descended, legal, 279.  
Devise to heir makes him a purchaser, 280.
- (4.) Realty devised charged with debts, equitable assets, 280.  
Though heir take through lapse of devise, 280.  
Land comprised in a residuary devise now applicable *pari passu* with specific devise, 280-281.
- (5.) General pecuniary legacies, 281.
- (6.) Specific legacies and devises *pro rata*, 281-282.  
Doctrine in *Hensman v. Fryer*, explained in *Lancefield v. Iggulden*, 281-282.
- (7.) Property over which testator has exercised a general power of appointment, 282.
- (8.) Paraphernalia, 282.

The testator's intention is the guide, in the administration of, 282-283.

Reasons why personalty is primarily liable, 283.

Intention to benefit shown more clearly in a specific than in a general legacy, 283.

Administration of separate estate of married women, 353-360.

See MARSHALLING OF ASSETS; MORTGAGES; LOCKE KING'S ACT, &c.

**ASSIGNEE—**

Of chose in action, notice by, 98.

Tantamount to possession, 98.

Gives right *in rem*, 98, 99.

Takes chose in action subject to equities, 99, 100.

Exception as to negotiable instruments, and as to debentures payable to bearer, 100.

Assignments contrary to public policy, 101.

Partaking of nature of champerty and maintenance, 101, 102.

Distinction between particular and general assignee, 380.

**ASSIGNMENT, EQUITABLE.—See EQUITABLE ASSIGNMENT.****ATTORNEY, POWER OF—**

Is not an equitable assignment or appropriation, 97, 98.

See EQUITABLE ASSIGNMENT.

**AUCTIONEER—**

Fiduciary position of, 474.

**AUCTIONS—**

Agreement not to bid at auction, 479.

Puffing at auction, when permitted, 479.

**AUXILIARY JURISDICTION—**

In aid of defects of common law system, 15, 16.

Where plaintiff having legal estate applies to auxiliary jurisdiction, defence of valuable consideration without notice is good, 30, 33.

**BANKERS AND BROKERS—**

Distinguished, 511.

**BANKRUPTCY ACT (1869)—**

How far it affects settlements as fraudulent, 89, 90.

**BENEFICIARIES—**

Trustees cannot take as, 130.

Devise with a charge, devisees take as, 130.

**BILL OF EXCHANGE—**

Acceptance of, in part payment of purchase-money no waiver of lien, unless taken in *substitution* of lien, 137.

When may be followed by *cestui que trust*, 166.

Remedy in case of lost, 425-6.

Remedy in case of destroyed, 426.

**BILL OF PEACE—**

How distinguished from Bill *quia timet*, 607.

Object of, 608.

Cases for, 608.

Instances of, 608-9.

Right conclusively established and afterwards threatened with fresh litigation, 609.

Oppressive actions of ejectment, 609-610.

No perpetual injunction in favour of a private as against a public right, 610.

Judicature Acts, effect of, 610.

**BILL, QUIA TIMET—**

In order to prevent anticipated wrong, 607.

As by appointing a receiver, or directing security to be given, 607.

Jurisdiction to cancel and deliver up documents on principle of, 611.

**BILL TO ESTABLISH WILL—**

Court of Probate had jurisdiction over wills of personality, 617.

Equity dealt with wills incidentally, 617.

Devisee might come into equity to establish a will against heir-at-law, 618.

Even though heir-at-law had not brought ejectment, 618.

Devisee might establish a will against all setting up an adverse right, 618-9.

Heir-at-law could come into equity only by consent, 619.

Proof of will in Probate division of High Court, mode and effect of,—

(1.) When in solemn form, 619.

(2.) When in common form, 620.

Recent decisions, effect of, 620-621.

Judicature Acts, effect of, 621-2.

**BILL TO PERPETUATE TESTIMONY.—See TESTIMONY, BILL TO PERPETUATE.****BILL TO TAKE EVIDENCE DE BENE ESSE.—See TESTIMONY, BILL TO PERPETUATE.****BILLS OF SALE ACT (1878)—**

Requires registration of post-nuptial settlement, 89.

See FRAUDULENT TRUSTS AND GIFTS.

**BONA VACANTIA—**

When Crown takes personality as, 131.

## BOND—

- Assigned by memorandum not under seal, when effective and when not, 68, 69.
- Acceptance of, for purchase-money, not a waiver of lien on estate, 137.
- Unless taken in *substitution* of lien, 137-8.
- Tacking of, 316.
- Remedy in case of lost, 421-2.

## BREACH OF TRUST—

- Creates a simple contract debt, 165-6.
- Right of following the property into which the trust fund has been converted, 164.
- When money and notes may be followed, 166-7.
- Interest payable on, 167-8.
- Release or confirmation by *cestui que trust*, 168.

## BROKERS AND BANKERS—

- Distinguished, 511.

## BUILDING SOCIETY MORTGAGES—

- Nature of fines in, 307.

## CANCELLING AND DELIVERY UP OF DOCUMENTS—

- When instrument ordered to be delivered up, 611.
- On principle *quia timet*, 611.
- Granting such a decree a matter not of right, but of discretion, 611.
- Voluntary deed or agreement, not ordinarily relieved against, 612.
- Relief granted on terms, 612.
- Relief where plaintiff has good defence at equity, though not at law, 612.
- (1.) Voidable instruments,—
  - (a.) When cancelled, 612.
    - Four groups of cases, 612-613.
    - Illustrations, 613.
  - (b.) When not cancelled, 613-614.
- (2.) Void instruments,—
  - (a.) When delivered up, 614.
    - Grounds for delivery up, 614-5.
  - (b.) When not delivered up, 615.
    - Grounds for non-delivery up, 615.
- Judicature Acts, effect of, 615-616.

## CARE AND DILIGENCE—

- Required of trustees and executors, amount of, 149-151.

## CAVEAT EMPTOR.—See FRAUD IN EQUITY.

## CERTAINTIES, THE THREE.—See TRUSTS, CREATION OF.

## CESTUI QUE USE.—See CESTUI QUE TRUST.

## CESTUI QUE TRUST—

- Death of, intestate and without representatives, effect of, 131.
- There is no escheat, if trustee or mortgagee seised in fee, 131.
- The Crown takes personality as *bona vacantia*, 131.

CESTUI QUE TRUST—(*continued.*)

- Trustee cannot in general purchase estate from, 153.
- Remedies of, in event of a breach of trust, 164-6.
- May follow the property, 164.
- Right of, to follow trust fund where wrongfully converted, 164.
- When notes, money, may be followed, 165.
- Acquiescence by, 168.
- Release or confirmation by, 168.
- See also TRUST; TRUSTEES.

## CHAMPERTY—

- Assignments affected by, 101, 102.
- Purchase *pendente lite*, when permitted and when not, 102.

## CHARGE OF DEBTS—

- Purchaser of personalty, exonerated, though a, 113, 114.
- Purchaser of realty, exonerated, where charge general, 114.
- Purchaser of realty, exonerated, under statute, even where debts specified, 114-5.
- Distinction between trust or power and charge,—as to when time is a bar or not, 266-267.
- Gives devisees in fee upon trust implied power to sell or mortgage, 115-6.
- Gives executors the like power, failing devisees, 115-6.

## CHARITIES—

- I. Charities are favoured by law in respects following :—
  - (1.) A testator's general charitable intention will be carried into effect by the court, 118, 119.
    - Provided object be, in fact, charitable, 119.
  - (1a.) Doctrine of *cy-pres* applied,—
    - Where a general charitable intention, 119, 120.
    - Not where there is a specific object, 120.
  - (2.) Defects in conveyance to, supplied, 120, 121.
  - (3.) No resulting trust of surplus to representatives of donor, where a general charitable intention, 121.
    - Even where excess of income subsequently arises, 121.
    - But a resulting trust where original income not all given, 122.
- II. Charities are treated on a level with individuals in respects following:—
  - (1.) Want of executor or trustee supplied, 122.
  - (2.) Lapse of time a bar, 122, 123.
- III. Charities less favoured than individuals in respect that,—
  - Assets not marshalled in favour of charities, 123.
  - Unless by express direction of testator, 123.

## CHATTELS PERSONAL—

- Statute of Uses not applicable to, 56.
- Trusts of, not within the Statute of Frauds, 58.
- Not within 27 Eliz., c. 4, 84.
- Donatio mortis causa* of, what constitutes. 170-176.
- Husband's right in wife's, 344.



CHATTELS REAL—

- Within 27 Eliz., c. 4, 84.
- Within Statute of Frauds, 58.
- Not within Statute of Uses, 56.
- Husband's right in wife's, 344-5.

CHILD—

- Presumption of advancement to. See ADVANCEMENT.
- Father is bound to maintain, 410.
- Fraudulent appointment by father to, 480.

CHOSE IN ACTION—

- Not generally assignable at law, 94.
- When assignable in Equity, 94, 95.
- At law also now, 95-100.
- Assignee of, takes subject to equities, 99; with certain exceptions, 100.
- Must be reduced into possession by trustee without delay, 161.
- Whether subject of *donatio mortis causæ*, 175-6.
- Husband's rights in wife's, 344-5.

CIVIL LAW—

- Traces of its influences on English Equity, 5, 13, 215.

COMMERCIAL PURCHASES—

- No survivorship in, 134.
- But land devised in joint-tenancy, and not used for partnership purposes, still remains joint, 134-5.

COMPENSATION.—See ELECTION.

COMPROMISES—

- Requisites to validity of, 435-6. See MISTAKE.

CONCEALMENT.—See FRAUD IN EQUITY.

CONCURRENT JURISDICTION—

- Where equity has, with common law, 13-15.
- Rule as to validity of defence of purchase for value without notice, being good, does not apply to, 33.
- Origin of, 418.
- Extends to cases where there is not a plain, adequate, and complete remedy at law, 418-419.
- Division of the subject, 419.

CONSIDERATION—

- Trust may arise without, 69. See VOLUNTARY TRUSTS.
- Classification of considerations, 85.
- Marriage a valuable, under 27 Eliz., c. 4, if *bona fide*, 85.
- Secus*, if *mala fide*, 86, 87.
- Who within scope of marriage consideration, 90.

CONSOLIDATION OF MORTGAGES—

- Distinguished from tacking, 317-8.
- Necessary limit to, 318.
- See TACKING; MORTGAGE.

CONSTRUCTIVE FRAUD.—See FRAUD IN EQUITY.

CONSTRUCTIVE NOTICE.—See NOTICE.

### CONSTRUCTIVE TRUSTS—

Definition of, and distinction from express and implied trusts, 136.

Varieties of :—

- (1.) Vendor's lien for unpaid purchase-money, 136, 141.  
     Lien not lost by taking a collateral security *per se*, 137.  
     As a bond, bill, or promissory note, 137.  
     Unless bond, &c., *substitutive* of the lien, 137-138.  
     Against whom lien may be enforced, 139-140.  
     Against whom lien may not be enforced, 140.  
     Vendor may lose his lien by negligence, 140-141.
  - (1a.) Vendee's lien for prematurely paid purchase-money, 141-2.
  - (2.) Renewal of lease by trustee in his own name, 142.
  - (3.) What improvements on land of another allowed for, 142-144.  
     He who seeks equity must do equity, 143.  
     Improvements by tenant for life, when allowed for, 143-144.
  - (4.) Heir of mortgagee trustee for personal representatives, 144.
- Mode of constructing trusts, explained and illustrated, 145.

### CONTINGENT INTERESTS AND POSSIBILITIES—

Assignable in equity, 94.

Assignable now at law also, 95.

See EQUITABLE ASSIGNMENTS.

CONTINGENT LEGACY.—See SATISFACTION.

CONTRACT.—See SPECIFIC PERFORMANCE ; INJUNCTION.

### CONVERSION—

Of terminable and reversionary property comprised in residuary bequest. See TRUSTEES.

Equitable, principles of, 182.

Of money into land, or land into money, 182

Under will or settlement, 182.

- (1.) What words are necessary, 183.  
     Must be imperative, either (a.) express or (b.) implied, as where limitations are adapted only to land, 183-184.
- (2.) Time from which conversion takes place, 184.  
     In wills, from testator's death, 184.  
     In deeds, from execution and delivery, 184-186.  
     Rule as to deeds inapplicable when conversion not the object, 186.  
     As in mortgages, 186-187.  
     Conversion depending on future option to purchase. See OPTION TO PURCHASE.  
     Where purpose subsequently fails, property is reconverted, 190-191.
- (3.) Effects of, 191.  
     Right to dower and curtesy in money to be laid out in land, 191.
- (4.) Results of total or partial failure of the objects :—  
     (a.) Total failure in deeds and wills alike, property results unconverted, 191-192.

CONVERSION—(*continued.*)

(b.) Partial failure :—

(aa.) Under wills,—

Undisposed-of proceeds of land directed to be turned into money result to the heir, 193-194.

Unless there is a gift over excluding him, 194.

Doctrine does not apply to sale by the court, 195.

The land to be sold results as to the surplus to the heir as personal estate, 195-196.

At least if that is its actual condition, 196, 197.

Where money directed to be laid out in land, undisposed-of money results to personal representatives as personal representatives, 197, 198.

But it results to the personal representatives as personalty, 198-199.

Blending of real and personal estate, the general principle not thereby excluded, 199, 200.

Heir-at-law not excluded except by a devise over, 200.

May be only for purposes of will, or out and out, 200.

(bb.) Under settlements,—

Property results to settlor in converted form, 201.

Distinction between partial failure under a will and under a settlement, 201-202.

See also RECONVERSION ; INFANTS ; LUNATICS.

COPYHOLDS—

Trusts of, within Statute of Frauds, 58.

COPYRIGHT—

Injunction in cases of, 574.

None in irreligious or immoral publication, 574-5.

What is an infringement, 575.

Copyright in maps, 576.

In lectures, 576-7.

Publication of letters, when restrained, 577.

COVENANTS—

To settle. See PERFORMANCE ; SATISFACTION.

To repair. See FORFEITURE.

To insure. See FORFEITURE.

To build or repair. See SPECIFIC PERFORMANCE.

To use land in a specified way. See INJUNCTION.

CREDITORS—

Trust in favour of, revocable, as a general rule, 91.

Amounts to mere direction to trustees as to mode of disposition, 91.

And is an arrangement for debtor's own benefit and convenience, 92.

Irrevocable after communication to, where creditor's position altered thereby, 92-94.

Where creditor a party to deed, 94.

Who not entitled to benefit of trust, 94.

Preference of, by executor, 263-264.

## CREDITORS, FRAUD UPON—

Under 13 Eliz., c. 5, 80-83.

Under Bills of Sale Act (1878), 87-89.

Under Bankruptcy Act (1869), 89, 90. See FRAUDULENT TRUSTS AND GIFTS.

At common law. See FRAUD IN EQUITY.

## CY-PRES—

Doctrine of, applied where a general charitable intention, 119-120.

But not where a specific object, 120. See CHARITIES.

## DAMAGES.—See INJUNCTION.

## DE BENE ESSE.—See TESTIMONY, BILL TO PERPETUATE.

## DEBITOR NON PRESUMITUR DONARE.—See SATISFACTION.

## DEBTS—

Assignment of. See EQUITABLE ASSIGNMENT.

Purchaser when bound to see to payment of. See CHARGE OF DEBTS.

Priorities among. See ASSETS; MARSHALLING OF ASSETS.

Trustee buying up for himself. See TRUSTEES.

Satisfaction of, by legacies. See SATISFACTION.

## DECLARATION OF TRUST—

May be without deed, 57, 58, 70-75.

## DELAY.—See ACQUIESCENCE, NEGLIGENCE.

## DELAY DEFEATS EQUITY.—See VIGILANTIBUS, &amp;c.

## DELEGATION—

By trustee of his office, 148-9.

Where there is a moral necessity, 149.

## DELIVERY—

Essential to *donatio mortis causæ*, 171.

What is a complete, 173.

What is not a complete, 174.

## DELIVERY-UP, SPECIFIC, OF CHATTELS—

Contracts as to rare and beautiful articles of *virtu*, 527.

Of picture to artist who had painted it, no price having been named, 527-8.

Heirlooms and chattels of peculiar value, 528.

Damages no compensation in such a case, 528.

Statutory powers as to, 528-9.

## DELIVERY-UP OF DOCUMENTS.—See CANCELLING AND DELIVERY UP OF DOCUMENTS.

## DEMONSTRATIVE LEGACY.—See LEGACIES.

## DEPOSIT, MORTGAGES BY.—See MORTGAGE, EQUITABLE.

## DEVISE—

On trust, devisee a trustee, 130.

With a charge, devisee takes beneficially, 130.

Of land subject to contract or option to purchase.—See OPTION TO PURCHASE.

DIRECTORS cannot derive personal benefit in their character as such,  
153.

#### DISCOVERY—

- Every bill in equity may be a bill of, 596.
- But a bill of, strictly so called, seeks for discovery in aid of proceedings in another court, 596.
- Generally an action must have been already commenced, 596-7.
- Origin of equitable jurisdiction, 597.
- Defences to bill of, 597-598.
- Plaintiff seeking, must show a title, 598.
- Heir-at-law during ancestor's life cannot have, 598.
- But heir-in-tail entitled to see title-deeds, 598.
- Plaintiff seeking, must state a *prima facie* case showing good ground of action or defence, 598-9.
- None in aid of matters not purely civil, 599.
- Nor where it would involve a forfeiture, 599.
- None in aid of court of competent jurisdiction, 599.
- Except when the other court had not that power originally, 599-600.
- Nor in aid of reference to arbitration, 600.
- Unless reference be compulsory, 600.
- Married woman cannot be compelled to disclose facts which may charge her husband, 600.
- None in breach of professional confidence, 600.
- Arbitrators not compellable to state grounds of award, 600.
- None against a mere witness, 600-601.
- Or a *bond fide* purchaser for valuable consideration without notice, 601.
- Or against a purchaser from him, though with notice, 601.
- Under the Judicature Acts, 601-2.

DISCRETIONS AND DUTIES.—See TRUSTEES.

#### DONATIO MORTIS CAUSÂ—

- Must be in expectation of death, 170.
- On condition to be absolute on donor's death, 170.
- Revoked by recovery or resumption, 170.
- Delivery essential to, 171.
- Imperfect testamentary gift not supported as, 171-2.
- Nor an ineffectual gift *inter vivos*, 172-3.
- Delivery of the means of obtaining the gift, good, 173.
- Delivery of essential document sufficient in case of chose in action, 174.
- What is a sufficient delivery—
  - To donee or agent for him, 173-174.
  - Not to donor's agent, 174.
- Donor must part with dominion over the gift, 175.
- What may be given as *donationes mortis causâ*, and what not, 175-6.
- How it differs from a legacy, 176.
- How it differs from a gift *inter vivos*, 176.

#### DOWER—

- Election with reference to, 224-5.
- What is inconsistent with widow's rights to, 225.

#### DRUNKENNESS—

- When a reason for setting aside a contract, 460.

DURESS.—See FRAUD IN EQUITY.

DUTIES AND DISCRETIONS.—See TRUSTEES.

### ELECTION—

Arises from inconsistent alternative gifts, 213.

Illustrations of such gifts, 213-214.

Foundation and characteristic effect of the equitable doctrine, 214-215.

Derived from civil law, 215.

Two courses open to elect between—

(a.) Under instrument, 215-216.

(b.) Against instrument, 216.

Principle of compensation, and not forfeiture, governs the doctrine, 216.

Cases where testator makes two bequests of his own property, no case of election proper, 217.

There must be a fund from which compensation can be made, *i.e.*, some property of donor's own, 217.

Case of donor not adding any property of his own, 217-218.

Case of donor adding some property of his own, 218-219.

Election under powers, 219.

(a.) As to person entitled in default, a true case of election, 219.

(b.) As to person entitled under power, no case of election proper, 219-220.

But the same thing in effect, 220-221.

(c.) Directions modifying appointment, when valid and when invalid, 221-222.

Where testator affects to dispose of his own by an ineffectual instrument, 222.

Infancy, 222-223.

Coverture, 223.

Wills before 1 Vict., c. 26, 223-224.

With reference to dower, 224-225.

What is inconsistent with widow's right to dower, 225.

To raise question of, immaterial whether testator did or did not know property not to be his own, 226.

Testator is presumed to have given his own where he has a limited interest, 226-228.

Evidence *dehors* the instrument not admissible to make out a case of election, 228.

Persons under disabilities, mode of election by,—

Married women, 228-229.

Infants, 229.

Lunatics, 230.

Persons compelled to elect may have accounts taken, 230.

Are not bound by mistake as to value, 230.

What is deemed an election by conduct, 230-231.

Length of time raises presumption of, 231.

### EQUALITY IS EQUITY—

Leaning in equity against joint-tenancies, 45. See JOINT-TENANCIES.

EQUITABLE ASSETS.—See ASSETS.

### EQUITABLE ASSIGNMENT—

General rule of old common law, that *choses in action* is not assignable, 94, 95.

**EQUITABLE ASSIGNMENT—***(continued.)*

- General rule infringed upon by equity, 95.
- General rule infringed even by common law, 95-96.
- Contingent interests and possibilities, assigned under 8 & 9 Vict., c. 106, 96.
- Policies of life and marine insurance now assignable by statute, 96.
- Debts and other legal choses in action under Judicature Act (1873), 96, 101.
- Order given by debtor to creditor on a third person a good equitable assignment, *i.e.*, appropriation, 96.
- Secus* mandate from principal to agent, 97, 98.
- Notice to legal holder by assignee is necessary to perfect his title as against third person, 98, 99.
- Such notice is tantamount to possession and gives assignee a right *in rem*, 99.
- Assignee of chose in action takes subject to equities, 99, 100.
- Except in the case of negotiable securities and of debentures payable to bearer, 100.
- Assignments contrary to public policy, as of salary of public officer, 101.
- Assignments affected by champerty and maintenance, 101, 102.
- Purchase of an interest *pendente lite* when permitted, and when not, 102, 103.

**EQUITABLE DEFENCES AT LAW.—**See **INJUNCTION**.**EQUITABLE JURISDICTION—**

- Courts bound by settled rules and precedents, 4, 5.
- Origin of jurisdiction of Court of Chancery, 7-12.
- Reasons of separation between Civil Law and English, 7, 8.
- New defences unprovided for, 8-11.
- Ordinance of 22 Edw. III. as to matters "of grace," 11, 12.
- Exclusive jurisdiction, 13-15.
- Concurrent jurisdiction, 13-15.
- Auxiliary jurisdiction, 15, 16.

**EQUITABLE MORTGAGE.—**See **MORTGAGE**, **EQUITABLE**.**EQUITABLE LIEN—**

- Vendor's lien for unpaid purchase-money, 136-141.
- Vendee's lien for prematurely paid purchase-money, 141.
- None, under covenant to purchase and settle lands, 235-236.
- See **CONSTRUCTIVE TRUSTS**.

**EQUITY—**

- Various senses in which equity is used, 1, 2.
- Common law as much founded on natural justice and good conscience as, 2.
- Definition of, by reference to its extent, and not its content, 2, 3.
- The old definitions of equity stated and explained, 3, 4.
- Modern equity, character of, 4, 6.
- Courts of, bound by settled rules and precedents, 4.
- Modes of interpreting laws same in, as at common law, 5, 6.
- Reasons of separation between common law and equity, 7-12.
- (1.) Common law became a *jus strictum* too early, 7, 8.

EQUITY—(*continued.*)

- (2.) Roman law was deprived of authority in the courts, 8.
- (3.) System of common law procedure more defective even than common law principles, 8-10.
- (4.) Failure of remedy attempted by statute in *consimili casu*, 10, 11.
- (5.) Ordinance of 22 Edw. III. made Chancellor a perpetual court for matters "of grace," 11, 12.

Modern fusion of equity and law, 12, 13.

Equity is a science and rests on maxims, 17. See MAXIMS OF EQUITY.

## EQUITY OF REDEMPTION.—See MORTGAGE.

## EQUITY FOLLOWS THE LAW—

In concurrent jurisdiction, absolutely, 19.

In exclusive jurisdiction, discretionarily, 19.

Limits of the maxim, 19.

Illustrations of maxim,—

- (1.) Application of canons of descent, 19-21.  
Mode of evading these rules in a proper case, 20, 21.
- (2.) Construction of words of limitation, 21.
- (3.) Application of statutes of limitation, 22, 23.

## EQUITY WILL NOT SUFFER A WRONG, &amp;c.—See NO WRONG WITHOUT A REMEDY IN EQUITY.

## EQUITY, WHO SEEKS, MUST DO—

Illustrations of maxim, 42-44.

## EQUITY LOOKS TO CLEAN HANDS—

Illustrations of maxim, 44.

## EQUITY LOOKS TO THE INTENT RATHER THAN THE FORM—

Illustrations of maxim, 46, 47.

## EQUITY, DELAY DEFEATS.—See VIGILANTIBUS, &amp;c.

## EQUITY, EQUALITY IS.—See EQUALITY IS EQUITY.

## EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO HAVE BEEN DONE—

Illustrations of the maxim, 47, 48.

## EQUITY IMPUTES AN INTENTION TO FULFIL AN OBLIGATION

—Illustrations of the maxim, 48.

## EQUITY TO A SETTLEMENT—

An equitable modification of the husband's legal rights, 374.

Marriage a gift of wife's personal property to husband subject to his reduction of it into possession, 374.

Her equity does not depend on a right of property in her, 374-5.

But arises from the maxim, "He who seeks equity must do equity," 375.

The court imposes conditions on the husband coming as plaintiff, 375.

Principle extended to the husband's general assignees, 375-6.

Wife permitted to assert her right as plaintiff, 376.

General principle on which court acts, 376-7.

General principle, illustrated, 377-384.

(1.) Wife's leasehold,—

(a.) Equitable, 377.

(b.) Legal, 377-378.



## EQUITY TO A SETTLEMENT—(continued.)

## (2.) Wife's pure personal property,—

(a.) Legal, 378.

(b.) Equitable, 378-9.

(aa.) Absolute interest, 378-9.

(bb.) Life interest,—

If husband is or is not maintaining wife, 379-380.

As against husband's assignee with notice, 380-1.

## (3.) Wife's realty,—

(a.) Of inheritance,—

(aa.) Legal, 381.

(bb.) Equitable, 381-2.

(b.) Life estate,—

(aa.) Legal, 382.

(bb.) Equitable, 382-3.

Wife's, defeated by her alienation, 384.

Of interests in real estate, 385.

Of interests in personal estate, 385.

Wife's choses in action belong to husband, if he reduce them into possession, 386.

Wife surviving her husband takes her reversionary interest which he has not reduced into possession, 386.

Assignee can take no more than the husband has to give, 386-7.

Court had not power to take wife's consent to part with her reversionary interest, 387.

For she would lose a future possible equity and her chance of survivorship, 387.

She has no equity out of reversionary interest, so long as reversionary, 387.

It is an obligation fastened, not on the property, but on the right to receive it, 387-388.

By 20 & 21 Vict., c. 27, *feme covert* may alien her reversionary interest in personalty by deed acknowledged, 388.

But not property which she is restrained from alienating, 388.

Not property settled on her marriage, 388.

As to cases of reversionary interests not within the Act, 389.

If husband die before reversion falls in, purchaser loses his purchase, 389.

If reversion falls into possession, the husband and wife living, purchaser will take it, subject to her equity, 389.

If wife die first, and then the reversion falls in, purchaser takes all, 389.

What amounts to reduction into possession, 390, 391.

Mere assignment of a reversion is not a reduction into possession, 390.

The husband must actually reduce it into possession, 390.

The mere power of doing so is not sufficient, 390.

Husband's transfer of title-deeds, of which his wife was equitable mortgagee, is not sufficient, 390.

Order of court to pay wife's income into receiver's hands is, 391.

Settlement, if made, must be on wife *and* children, 391.

Though she may waive it, and thus deprive her children, 391.

When the right of children becomes indefeasible, 392.

If wife dies before bill filed, children have no right, 392.

If wife dies after filing bill, but before decree, children have no right, 392.

EQUITY TO A SETTLEMENT—(*continued.*)

- Right of children as against husband arises on decree, 393.
- Right of children may arise out of contract by father, 394.
- Wife may after decree, but before execution of the settlement, waive her, and so defeat her children's right, 394.
- What will defeat her right to a settlement, 394.
  - Husband's receipt of the fund, 394.
  - Where her debts exceed the fund, 395.
  - Where his debts exceed the fund, 395.
  - An adequate settlement, 395.
  - Her adultery and desertion of the husband, 395.
  - She does not lose it, where both are living in adultery, 395.
  - Her fraud, 395.
- Amount of settlement, 396-7.
- If husband refuse, so long as he maintains her, he takes income, 396.
- Amount depends on circumstances, 396-7.
  - Previous benefits from husband's property, 396.
  - Conduct of both, 396.
  - Generally half the fund is settled on her, 396.
  - Sometimes the whole, 397.
- Form of settlement, 397.
- How far binding as against creditors of husband, 397-8.
  - If husband reduce her property into possession, and then make a settlement, it must conform to 13 Eliz., c. 5, 397-8.
  - Valid if *bonâ fide*, although on a meritorious consideration, 398.
  - Trader's settlement of wife's property under Bankruptcy Act (1869), 398.
  - If court decree the settlement, creditors are bound, 398.
  - Settlement by husband on trustees refusing to part with the wife's property, also good, 398.

EVIDENCE.—See EXTRINSIC EVIDENCE.

EVIDENCE DE BENE ESSE.—See TESTIMONY, BILL TO PERPETUATE.

## EXCLUSIVE JURISDICTION—

- Prior to Judicature Acts, 13, 15.
- Subsequent to, and in consequence of, same Acts, 14, 15.

## EXECUTOR—

- Before 1 Will. IV., c. 40, entitled to undisposed-of residue of personal estate, 129.
- Except where excluded by testator's intention, express or implied, 129.
- Now trustee for representatives of deceased, 129, 130.
- Care and diligence required of, 147, 148; 154-156.
- No remuneration allowed to, 148.
- May not make profit out of estate, 149, 150.
- Answerable for own acts only, 154, 155.
- Difference between trustee and, 155.
- Joining in receipts *primâ facie* liable, 155, 156.
- Must not allow estate of testator to remain out on personal security, 158.
- And must forthwith invest same, 158, 159.
- Investments by, on authorised securities, 158, 159.
- Statutory powers of investment, 159, 160.
- Conversion of terminable and reversionary property by, 160.

**EXECUTOR—***(continued.)*

- Right of, to prefer creditor, 263-264.
- Retainer by, 283-284.
- Not charged for accidental loss or failure of assets, 428.
- Under such circumstances creditor's action stayed, 557.
- See also TRUSTEES.

**EXECUTED AND EXECUTORY TRUSTS, 60-67.**

- Distinction between *in se*, 60, 61.
- As to trusts executed, equity follows law, 61.
- As to trusts executory, equity may or may not follow law, 61-67.
- Distinction between executory trusts in marriage articles and in wills, 62, 63.
- Under marriage articles, court decrees a settlement in conformity with presumed intention, 63, 64.
- In wills, court seeks for the expressed intention, 64.
- Trusts executory in wills construed strictly in absence of expressed intention to the contrary, 65.
- Trusts executory construed according to contrary intention if that is expressed, 65-67.
- What expressions show a contrary intention, 67.

**EX NUDO PACTO NON ORITUR ACTIO—**

- Application of maxim to voluntary trusts, 68, 69.
- See VOLUNTARY TRUSTS.

**EXONERATION—**

- What exonerates personalty from payment of debts, 272-273.
- Mortgaged estate exonerated prior to Locke King's Act, 17 & 18 Vict., c. 113, 273-274.
- Personalty primarily liable, unless mortgaged estate devised *cum onere*, or personalty exonerated, 274-275.
- Mortgaged estate is primary fund, when mortgage is ancestral debt, 275.
- Unless adopted as a personal debt, 275.
- Since Locke King's Act mortgaged freeholds and copyholds devolve *cum onere*, 276.
- Query—as to leaseholds, 276.
- Leaseholds included in Amending Act (1877), 276.
- Act refers only to specified charges, 276.
- Vendor's lien under 30 & 31 Vict., c. 69, and 40 & 41 Vict., c. 34, 276-277.
- Provided there be no contrary or other intention expressed, 277-278.
- Mortgaged estate exonerated, if a direction to pay debts out of another fund, 278.
- But not by a general direction to pay debts, 278-279.
- By 30 & 31 Vict., c. 69, intention to charge the personalty must be expressed or necessarily implied, 279.

**EXPECTANCIES.—See EQUITABLE ASSIGNMENT; FRAUD IN EQUITY.****EXPRESS TRUSTS—**

- Express private trusts, 60-123.
- (1.) Executed and executory trusts, 60-67.
- (2.) Voluntary trusts and trusts for value, 68-80.
- (3.) Fraudulent trusts, 80-91.

**EXPRESS TRUSTS—(continued.)**

- (4.) Trusts in favour of creditors, 91-94.
- (5.) Equitable assignments, 94-103.
- Requisites to creation of express private trusts, 103-109.
- Secret trusts, 109-111.
- Powers in the nature of trusts, 111-113.
- Liability of a purchaser to see to application of his purchase-money, 113-117.
- Express public [*i.e.*, charitable] trusts, 118-123. See **CHARITIES**.

**EXTRINSIC EVIDENCE—**

- When and what admissible to disprove resulting trust, 125-126.
- When and what admissible to rebut or to affirm advancement, 128-129.
- When admissible in case of secret trusts, 109-111.
- Inadmissible to raise question of election on will, 228.
- When and where not admitted in cases of satisfaction, 257-9.
- Admissible to prove accident, mistake, fraud, 434.

**FALSIFYING, SURCHARGING AND.—See ACCOUNTS ; TRUSTEES.****FAMILY COMPROMISES.—See COMPROMISES ; MISTAKE.****FEME COVERT.—See MARRIED WOMEN.****FOLLOWING TRUST FUNDS.—See TRUSTEES.****FORFEITURES, PENALTIES AND—**

- Equitable jurisdiction in, maxim underlying, 46, 47.
- On breach of condition of repayment in mortgage, equity relieves against legal, 296.
- Relief in equity against stipulation for higher rate of interest in default of punctual payment, 307.
- Like relief against fines in building society's mortgages, 307.
- Doctrine as to, 337.
- Penalty, &c., deemed accessory, 337.
- If compensation can be made, equity relieves, 337.
- Party cannot avoid the contract by paying penalty, 338.
- Where covenantor may do either of two things, paying higher for one alternative than the other, it is not a penalty, 338-9.
- As double rent for breaking up meadow land, 339.
- Rules as to distinction between penalty and liquidated damages, 339-340.
- Smaller sum secured by larger, the larger a penalty, 339.
- Covenant to do several things, and one sum for breach of any or all, a penalty, 340.
- Where amount of injury cannot be measured, not a penalty, 340.
- Especially if only one event on which money is to be payable, and no means of ascertaining damage, 340-341.
- Mere use of term "penalty" or "liquidated damages," not conclusive, 341.
- The court leans towards construing sum as a penalty, 341.
- Forfeitures governed by same principles as penalties, 341-2.
- Excepting as between landlord and tenant, 341.
- Forfeiture for breach of covenant to repair, not relievable, 342.
- To insure, 342, 343.
- Courts of equity may relieve under 22 & 23 Vict., c. 35, 342-3.
- Courts of law under 23 & 24 Vict., c. 126, 342-3.

## FRAUD AT LAW—

- (1.) At common law. See FRAUD IN EQUITY.
- (2.) Under 13 Eliz., c. 5—  
Criterion of fraud is embarrassment, 80-83.
- (3.) Under 27 Eliz., c. 4—  
Criterion of fraud is voluntary conveyance, 83-87.
- (4.) Under Bills of Sale Act (1878)—  
Criterion of fraud is non-registration, 87-89.
- (5.) Under Bankruptcy Act (1869)—  
Regarding only husband's property in his own right, 89, 90.  
See FRAUDULENT TRUSTS AND GIFTS.

## FRAUD IN EQUITY—

## I. ACTUAL—

In what cases equity gives relief, 447.

No invariable rule, 447.

Equity acts upon weaker evidence than law in inferring, 448.

Actual fraud of two kinds, 444.

1. Arising from the conduct of parties, irrespective of the position of the injured party, 449.

- (a.) MISREPRESENTATION or *suggestio falsi*, 449.

Where made intentionally, 449.

Where made with intent to mislead a third party, 449.

Must be of some material fact, 450.

Must be *dans locum contractui*, 450.

Must be of something in which there is a confidence reposed, 450, 451.

*Caveat emptor* where party chooses to judge for himself, 451.

The party must be misled by the misrepresentation, 451.

To his prejudice, 451.

Misrepresentation by directors of companies, 452.

If misrepresentation can be made good, equity will compel it, 452.

A person to avail himself of another's, must himself be innocent, and have given value, 452-3.

Ratification, 453.

- (b.) CONCEALMENT, or *suppressio veri*, 453.

Facts must be such as the party was under an obligation to disclose, 453.

Purchase of land with mine unknown to vendor but known to vendee, 453-4.

Sale of land subject to incumbrances known only to vendor, 454.

As to intrinsic defect in personal chattels, *caveat emptor*, 454.

Unless there be some artifice or warranty, 454.

Or vendor was bound to disclose, 454.

Silence sometimes tantamount to direct affirmation, but in exceptional cases only, 454.

*E.g.*, cases of insurance, 454-5.

Insured must communicate all material facts within his knowledge, 455.

Inadequacy of consideration will not *per se* avoid a contract, 455-6.

Inadequacy may be evidence of fraud, and then it will avoid a contract, 456-7.

## FRAUD IN EQUITY—(continued.)

- Equity will not aid where parties cannot be placed *in statu quo*, 457.
- Fraudulent contracts usually valid until avoided, 459.
- „ „ may become not avoidable, 457.
- „ „ may not affect company, 458.
- Contracts fraudulent by statute merely, 458.
2. Cases of fraud arising from the condition of the injured parties, 458.
- Free and full consent necessary to every agreement, 458-459.
- Gifts and legacies on condition against marrying without consent, not defeated by fraudulent refusal, 459.
- (1.) Persons *non compos mentis*, 459.
- Contract with lunatic in good faith and for his benefit will be upheld, 459.
- (2.) Drunkenness,—
- Must be excessive in order to set aside contract, 460.
- Slight, not a cause for relief unless unfair advantage taken, 460.
- Parties left to remedy at law, 460.
- (3.) Imbecile persons, 460-1.
- (4.) Persons of competent understanding under undue influence, 461.
- Duress, or extreme necessity, 461.
- (5.) Infants, 461.
- Liable for necessities, 461.
- Equity will not uphold agreement to prejudice of, 461-2.
- Acts of an infant may be voidable, 462.
- (6.) *Feme covert* no capacity to contract at law, 462.
- Quasi-power to contract in equity in respect of her separate estate, 462-3.
- And under Married Women's Property Act (1870), 463.
- I. CONSTRUCTIVE—
- Three Classes, 464.
- (1.) Constructive frauds as contrary to policy of the law, 464-5.
- Marriage brokerage contracts, 465.
- Reward to parent or guardian to consent to marriage of child, 465.
- Secret agreement in fraud of marriage, 465.
- Rewards given for influencing another person in making a will, 465-6.
- Contracts in general restraint of marriage, void, 466.
- „ „ „ of trade, „ 466.
- But not special restraint, 466.
- Agreements founded on violation of public confidence, 466.
- As buying and selling offices, 467.
- Frauds in relation to the transfer of shares in joint-stock companies, 467-8.
- Neither party to an illegal agreement is aided, as a general rule, 468.
- Except on grounds of public policy, 468.
- (2.) Constructive frauds arising from a fiduciary relation, 468.
- Gifts from child to parent void if not in perfect good faith, 468-9.
- Gifts by child shortly after minority, 469.
- By father when infirm in mind and body, 469.
- Guardian and ward cannot deal with each other during continuance of the relation, 469.

## FRAUD IN EQUITY—(continued.)

- Gift by ward soon after termination of guardianship viewed with suspicion, 469.
- Gift upheld when influence and legal authority have ceased, 469, 470.
- Quasi-guardians, 470.
- Medical advisers, 470.
- Ministers of religion, 470.
- Solicitor and client, 470.
- Gift from client to solicitor pending that relation cannot stand, 470-1.
- Solicitors may purchase from client, but there must be perfect *bond fides*, 470-471.
- Rule as to gifts is absolute, 471.
- Solicitor must make no more advantage than his fair professional remuneration, 471.
- Agreement to pay a gross sum for past business is valid, 471-2.
- And for future business, under 33 & 34 Vict., c. 28, 472.
- Trustee and *cestui que trust*, 472.
- Trustees must not place themselves in a position inconsistent with the interests of the trust, 472-3.
- Purchase by trustee from *cestui que trust* cannot be upheld, 473.
- Except on clear and distinct evidence that the *cestui que trust* intended the trustee to purchase, 473.
- Trustee may purchase from *cestui que trust*, who is *sui juris*, and has discharged him, 473.
- Gift to trustee treated on same principles as one between guardian and ward, 473.
- Principal and agent, 474.
- Entire good faith and complete disclosure necessary in dealings between principal and agent, 474.
- Agent cannot make any secret profit out of his agency, 474.
- Other cases of confidential or fiduciary relations, 474-5.
  - Counsel, 474.
  - Auctioneers, 474.
  - Debtor, creditor, and sureties, 474.
  - Creditor doing or omitting any act to the injury of sureties, releases the latter, 474-5.
- (3.) Constructive frauds, as being unconscientious or injurious to the rights of third parties, 475.
- Statute of Frauds cannot be set up as a protection to fraud, 475.
- If contract not put into writing through fraud of a party, he cannot set it up as a defence, 475.
- Common sailors, 475.
- Bargains with heirs and expectants, 476.
- Purchase of reversions since 32 & 33 Vict., c. 4, 468, 476.
- Knowledge of person standing *in loco parentis* does not *per se* make invalid transactions valid, 476-477.
- Post obits*, 477.
- Tradesmen selling goods at extravagant prices, 477.
- Party injured may acquiesce after pressure of necessity has ceased, 477.
- One who knowingly produces false impression to mislead third person, or who enables another to commit a fraud, is answerable, 477-478.
- A man who has title to property standing by, and letting another purchase or deal with it, is bound, 477-478.

## FRAUD IN EQUITY—(continued.)

Even though there be no fraud, only forgetfulness, 477-478.

Agreements at auctions not to bid against one another, 479.

Employment of puffer at auction, 479.

Fraud upon consenting creditors to a composition deed, 479.

A person obtaining a donation must always be prepared to prove *bond fides*, 479-480.

A power must be exercised *bond fide* for the end designed, 480.

Secret agreements in fraud of object of power, 480.

Appointment by father to a sickly infant, 480.

Doctrine of illusory appointments, 481.

Abolished by 1 Will. IV., c. 46, 481.

Effect of Powers Amendment Act, 1874, 481.

A man representing a certain state of facts as an inducement to a contract cannot derogate from it by his own act, 481.

## FRAUD ON MARITAL RIGHTS—

Wife must not commit a fraud on marital right, 399.

Conveyance by wife, *prima facie* good, 399.

(1.) If during treaty of marriage she alienes without husband's knowledge property to which she has represented herself entitled, it is fraudulent, 399.

(2.) Even where he did not know her to be possessed of such property, 399-400.

(3.) Not fraudulent, if to a purchaser for valuable consideration without notice, 400.

(4.) Void, even though meritorious, if secret, 400.

(5.) Knowledge by intended husband binds him, 400.

(6.) A husband can only set aside a conveyance when made pending the treaty of marriage with *him*, 401.

He must be her intended husband, 401.

(7.) If he has seduced her before marriage, her conveyance is good as against him, 401.

## FRAUDS, STATUTE OF—

Trusts, required to be in writing by, 57-58.

Exception from, 58.

Interests within, 58.

Resulting trusts not within, 58.

Mortgage by deposit an exception to, 58.

Specific performance of parol agreement notwithstanding. See SPECIFIC PERFORMANCE.

Parol evidence, when admissible under. See EXTRINSIC EVIDENCE.

## FRAUDULENT TRUSTS AND GIFTS—

(1.) Under 13 Eliz., c. 5, 80-83.

Settlement to be both for good consideration and *bond fide*, 81.

Settlement, voluntary, not necessarily fraudulent, 81.

Settlor being indebted does not invalidate conveyance, 81.

Settlor being embarrassed at time, or becoming embarrassed in consequence, invalidates conveyance, 81-83.

(2.) Under 27 Eliz., c. 4, 83-87.

Voluntary settlement void against subsequent purchaser, 83-84.

Voluntary settlement void against subsequent mortgagee, 84.

Subsequent purchase must be from very settlor, 84.



**FRAUDULENT TRUSTS AND GIFTS—***(continued.)*

Chattels personal, not within the statute, 84.

*Quære*, leaseholds subject to onerous covenants, 84.

Considerations meritorious and valuable distinguished, 84-85.

Marriage to follow is a valuable consideration, if *bonâ fide*, 85-86.

Marriage to follow is not a valuable consideration, if *malâ fide*, 86-87.

Settlement in pursuance of præ-nuptial agreement is not voluntary or fraudulent, 85-86.

Slight value added to meritorious consideration, effect of, 86.

(3.) Under Bills of Sale Act (1878), 87-89.

(4.) Under Bankruptcy Act (1869), 89-90.

(a.) As to husband's property in his own right, 89.

(b.) As to husband's property in right of wife, 89-90.

**FUSION OF LAW AND EQUITY—**

Under Judicature Acts (1873-75), 12-16.

**GENERAL LEGACIES.—**See **LEGACIES.****GIFTS, INTER VIVOS—**

If ineffectual, not supported as *donatio mortis causâ*, 172-173.

How they differ from a *donatio mortis causâ*, 176.

**GUARDIANS—**

Cannot derive personal benefit from the estate of their wards, 149, 153.

Who may be, and their duties, 402-403. See **INFANTS.**

Gift from infant to, how far valid, 469-470.

Quasi-guardians, as medical advisers, ministers, fraud by, 470. See **FRAUD IN EQUITY.**

**HE WHO SEEKS EQUITY MUST DO EQUITY—**

Illustrations of maxim, 43-44.

**HEIR—**

There must be a gift over of real estate directed to be sold to exclude, 193-4, 200.

Undisposed-of proceeds result to, 193-194.

In what character the land to be sold results to, 195-196. See **CONVERSION.**

Devisee may come into equity to establish will against, 618.

Can only come into equity by consent of devisee to try validity of will, 618.

**HEIR OR EXECUTOR.—**See **CONSTRUCTIVE TRUSTS ; CONVERSION ; RECONVERSION.****HUSBAND AND WIFE.—**See **MARRIED WOMAN.****IGNORANTIA LEGIS NEMINEM EXCUSAT.—**See **MISTAKE.****IMPERFECT CONVEYANCE—**

Evidence of a contract, 69.

**IMPLIED AND RESULTING TRUSTS—**

(1.) Purchase in the name of stranger results to the purchaser, 124.

Applicable to realty as well as personalty, 124-125.

## IMPLIED AND RESULTING TRUSTS—(continued.)

Parol evidence admissible to show actual purchaser, 125.

But not so as to defeat policy of law, 126.

Resulting trust may be rebutted by evidence, 126.

Advancement, presumption of, 126-129. See ADVANCEMENT.

- (2.) Resulting trust of unexhausted residue, 129-130.

*Devisee charged* distinguished from *devisee on trust*, 130.

Who takes, where settlor dies without representatives—

(a.) As to realty, trustee or mortgagee takes (*i.e.*, keeps), 113.

(b.) As to personalty, crown takes as *bona vacantia*, 131.

Executors trustees (since 1830) of undisposed of residuary personalty, 132.

- (3.) Resulting trust under doctrine of Conversion, 133. See CONVERSION.

- (4.) Joint-tenancies, implied trusts arising out of, 133-135. See JOINT-TENANCY.

## IMPROVEMENTS—

By life-tenant, when allowed as against the inheritance, 142-143.

## IMPUTATION OF PAYMENTS.—See APPROPRIATION OF PAYMENTS.

## IN ÆQUALI JURE, MELIOR EST CONDITIO POSSIDENTIS.—

See FRAUD IN EQUITY.

## IN CONSIMILI CASU, WRIT OF—

New cases unprovided for by existing writs gave rise to, 10-11.

## INDEMNITY OF TRUSTEES.—See TRUSTEES.

## INFANTS—

Reconversion by, 205-206.

Election by, 229.

Guardians of, who may be, 402-403.

1. Father, 402.

2. Mother, 402.

3. Testamentary guardian, 402.

4. Guardian appointed by stranger standing *in loco parentis*, 402-403.

5. Guardian appointed by court, 403.

Jurisdiction from crown as *parens patriæ*, 403.

Delegated to Chancery, 403.

Becomes ward of court when bill is filed relative to his estate, 404.

Or an order made without suit, 404.

Infant must have property that court may exercise its jurisdiction, 404.

Jurisdiction over guardians, 404-5.

When father loses his guardianship, 405.

Guardian selects mode and place of education of his ward, 405.

When he gives security, 405-6.

Guardian must not change character of ward's property, 406.

Except where necessary for his benefit, 406.

Representatives who would have taken before the change, still take after the conversion, 406-7.

Marriage of a ward of court must be with permission, 407.

Conniving at marriage of, without consent of court, a contempt, 407-8.

Guardian must give recognisance that ward shall not marry without consent, 408.

## INFANTS—(continued.)

- Improper marriage restrained by injunction, 408.
- Settlement must be approved by court, 408.
- Settlement under Marriage Act, 4 Geo. IV., c. 76, 409.
- Binding settlements by infants, under 18 & 19 Vict., c. 43, 409.
- Waiver by ward of her settlement, 409-410.
- Father bound to maintain his children, though there is a provision for maintenance, 410.
- Except when he is prevented by poverty, 410.
- Wife liable under 33 & 34 Vict., c. 93, 410.
- When father is entitled to an allowance, 410.
- How allowance is regulated, 410-411.

## INJUNCTION—

- Definition of, 551.
- Its object preventive rather than restorative, 551.
- Jurisdiction arose from want of adequate remedy at law, 551-2.
- Two classes of injunctions prior to Judicature Acts, 552.
- Judicature Acts, changes effected by, 552-3.
- 1. Orders (in lieu of injunctions) to stay proceedings, 553.
  - The injunction did not interfere with jurisdiction of common law courts, 553-4.
  - Equity acts *in personam* on the conscience of the person enjoined, 554.
  - Equity may even restrain proceedings in a foreign court, if parties within jurisdiction, 554-5.
  - Relief where the remedy at law would be complete if proofs could be had, 555.
  - So in cases of purely equitable rights, 555.
  - Equity would restrain proceedings on an instrument obtained by fraud or undue influence, 555-6.
  - Where loss by executor or administrator of assets without his default, will restrain proceedings against him by the creditors, 556.
  - Equitable title protected against a bare legal title, 556-7.
  - Husband a trustee for wife of separate property not vested in other trustees, 556-7.
  - Injunction on creditor's bill for administration, 557.
  - A party cannot bring several suits for one and the same purpose, 557.
  - Except in case of mortgages, 557.
  - Court protects officers who execute its own process, 557-8.
  - Where equity would not stay proceedings at law, 558.
    - (1.) In criminal matters, or matters not purely civil, 558.
    - (2.) Where ground of defence equally available at law, 558-9.
    - (3.) Matters duly adjudicated upon by common law court could not be opened in equity, 559-560.
  - Equitable defences allowed at common law, 560.
  - But only where equity would grant an unconditional and perpetual injunction, 560.
  - Defendant could not be compelled to plead an equitable defence at law, 560-1.
- 2. Injunctions against wrongful acts of a special nature, two classes of,—

INJUNCTION—(*continued.*)

## (A.) Injunctions in cases of contract, 561.

Supplemental to the jurisdiction to compel specific performance, 561-2.

Injunction a mode of specifically performing negative agreements, 562.

Equity will restrain the breach of one part of an agreement, though it cannot compel specific performance of another, 562-4.

None where court cannot secure performance by plaintiff, 564.

Injunction although contract is *implied* only, 564.

Injunction in case of misrepresentations, 565-6.

(B.) Injunctions in special cases independent of contract, *i.e.*, against torts, 565.

Wherever there is a right, there is a remedy for its breach, if the right be cognisable in a court of justice, 565-6.

Equity will not interfere where legal remedy is complete, 566.

## 1. Jurisdiction in case of waste, 566.

Arose from incompetency of common law, 566.

Common law powers over waste, 566.

In what cases equity interferes, 566-7.

Equitable waste, 567.

Where a person is dispunishable at law, 567.

Where tenant for life abuses his legal right to commit waste, 567-8.

Tenant in tail after possibility of issue extinct, 568.

Where aggrieved party has purely an equitable title, 568.

Mortgagor and mortgagee, 568.

Permissive waste not remediable in equity, 568.

Waste under Judicature Act, 568-9.

## 2. Nuisances, 569.

Public nuisances abated by indictment, but sometimes also by injunction on information, 569.

Where it causes special damage, 569.

Private nuisance, 569-570.

Court will not interfere if it can be compensated by damages, 570.

Where injury irreparable, 570.

Darkening ancient lights, 570-1.

Right to lateral support of soil, 571.

Of soil with buildings on it, 571.

Pollution of streams, 571-2.

Plaintiff would otherwise have to bring a series of actions, 572.

Further pollution of streams, 572.

## (3.) Copyright, patents, and trade-marks, 572.

Damages at law utterly inadequate, 572-3.

Jurisdiction, when exercised, 573.

## (A.) Cases of patents, injunction not matter of course, depends on circumstances, 573.

As whether patent has been in existence for a long time, or its validity been established at law, 573-4.

INJUNCTION—(*continued.*)

Three courses open to the court, on interlocutory application for injunction, 574.

(a.) Injunction *simpliciter*, 574.

(b.) Interim injunction, plaintiff undertaking as to damages, 574.

(c.) Motion ordered to stand over, defendant keeping meanwhile an account, 574.

## (B.) Cases of copyright, 574.

No copyright in irreligious, immoral, or libellous works, 574-5.

What is an infringement of copyright, 575.

*Bond fide* quotations, or abridgment, or use of common materials, not an infringement, 575.

Piracy of maps, calendars, tables, &c., 576.

Copyright of lectures, 576-7.

Copyright in letters on literary subjects or private matters, 577.

(1.) The writer may restrain their publication, 577.

(2.) The party written to may also restrain their publication by a stranger, 577.

(3.) Publication permitted on grounds of public policy, 577.

Injunction against publication of an unpublished manuscript, 577-578.

## (C.) Cases of trade-marks, injunction does not depend on property, but because equity will not permit fraud, 578.

The right tested by its violation, 578.

A man cannot be restrained from using his own name as vendor of an article if not guilty of fraud, 578-9.

Use of word "original," a fraud on the public, 579.

Lord Cairns's Act, 580.

Equity may give damages, where it has a jurisdiction to grant injunction or specific performance, 580.

May assess damages with or without a jury, or direct an issue, 580.

Construction and effect of the Act, 581.

(1.) Jurisdiction not extended where there is a plain common law remedy, 581.

(2.) No damages where the contract cannot be performed at all, 581.

(3.) No relief where damages only are asked for, 581.

(4.) Damages may be awarded where a mandatory injunction is refused, 581.

(5.) Where right to injunction, damages not given in substitution, 581.

(6.) Where court may compel specific performance of part of an agreement, it may give damages for breach of another part, which it could not have enforced, 581-2.

Sir John Rolt's Act, 583.

Injunction at common law, 583.

An action must have been already commenced, 583.

## IN LOCO PARENTIS—

What puts one in, 250-252.

## IN PARI DELICTO POTIOR EST CONDITIO POSSIDENTIS.—See FRAUD IN EQUITY.

## IN PERSONAM—

Equity acts, 50.

## INSURANCE—

Policies of life and marine, assignable, 72-75 ; 96.

Forfeiture on breach of covenant to insure, relieved against, 342-3.

Contract of, void, unless complete disclosure, 454-5.

## INTEREST—

What payable on breach of trust, 167-8.

What payable in exceptional cases, 168.

## INTEREST REIPUBLICÆ, UT SIT FINIS LITIIUM.—See BILL OF PEACE.

## INTERPLEADER—

Where two or more persons claim the same thing from a third person, 589.

Suits at law may be restrained till after the right is determined, 589.

At common law only in cases of joint-bailment, 589.

Plaintiff must have no personal interest in the subject-matter, 590.

Auctioneer claiming commission cannot maintain a suit of, 590-1.

Essential that the whole of the rights claimed by the defendants should be finally determined by the litigation, 591.

Where one title is legal and the other equitable, 591-2.

No interpleader in case of adverse independent titles not derived from the same common source, 592.

Agent cannot have, against principal, 592.

Except where principal has created a lien in favour of a third party, 592-3.

Tenant cannot file a bill against his landlord, and a stranger claiming by a paramount title, 593.

But tenant may bring bill of, in exceptional cases, 593-4.

Sheriff seizing goods could not, 594.

He may do so where there are conflicting equitable claims, 594.

Under the Judicature Acts, 594-5.

## INVESTMENTS—

On authorised securities only, by trustees, 161-2.

Range of investments authorised by statute for trustees, 162-3.

## JOINT-TENANCIES—

Equity does not favour, 133.

None where purchase-money advanced in unequal shares, 134.

None where mortgage-money advanced in equal or unequal shares, 134.

Equity discourages survivorship, and even law does so, in commercial purchases, 134.

Full survivorship, where lands devised in joint-tenancy, 134.

Unless such lands thrown into partnership assets, 134-5.

Lien for improvements on property held in, 336.

For costs of renewing lease by joint-tenant, 336.

## JUDICATURE ACTS, INFLUENCE OF—

General effects of fusion of law and equity, 12-16, 18.

As to assignments of chose in action, 77-96, 100.

**JUDICATURE ACTS, INFLUENCE OF—***(continued.)*

As to time being no bar to breach of trust, 165-6.

As to administrations of assets, 269-271.

As to executor's liability for accidental loss of assets, 428.

As to suretyship, 488-9.

As to auxiliary jurisdiction generally, 15-16, 601, 606, 610, 615-616, 621-622, 624.

**JUDGMENT CREDITOR—**

Is not within 27 Eliz., c. 4, 84.

Priority of, in administration of assets, 262-3.

**JURISDICTION IN EQUITY—**

Nature and character of, 1, 2.

Origin of, 6-12.

Modern fusion of, with law, 12, 13.

Classification of, prior to and as affected by Supreme Court of Judicature Act, 13-16.

**JUS ACCRESCENDI—**

Not applicable to mercantile transactions, 134.

**LACHES.—See ACQUIESCENCE.****LAND.—See ASSETS ; CONVERSION.****LANDLORD AND TENANT—**

Limited relief in equity between, 341-3.

**LAW, EQUITY FOLLOWS ANALOGY OF.—See EQUITY FOLLOWS LAW.****LAW PREVAILS, WHERE EQUITIES EQUAL—**

Illustration of the maxim, 25, 26.

Application when defendant is purchaser for value without notice, 26.

(1.) Where plaintiff has equitable estate only, and defendant has legal and equitable estate both, 27-30.

(2.) Where plaintiff has legal estate and defendant equitable estate  
(a.) In auxiliary jurisdiction, 30-33.

(b.) In concurrent jurisdiction, 33.

(3.) Where plaintiff has equitable estate, and defendant equitable estate, 33, 34.

(4.) Where plaintiff has an equity only, and defendant the actual estate, 34, 35.

See also **LEGAL ESTATE ; PURCHASER.**

**LEGACIES—**

Suits for, only in equity, unless executors assent, 177-178.

Equity jurisdiction, when exclusive, 178.

Equity jurisdiction, when concurrent, 178.

Jurisdiction of equity not affected by Court of Probate Act (1857), nor (practically) by Judicature Acts (1873-75), 177-178.

Division of,—

(1.) General, 178.

(2.) Specific, 179.

(3.) Demonstrative, 179.

Distinctions between, 179-180.

Construction of, 180.

Interest upon, from what date computed, 180-181.

See also **SATISFACTION ; PERFORMANCE.**

LEGAL ASSETS.—See ASSETS.

LEGAL ESTATE—

What constitutes best right to call for, 29, 30.

Preference given to, 26.

Whether got in at time of purchase (or mortgage) or afterwards, 27, 28.

See MORTGAGE; NOTICE.

LIABILITY OF PURCHASER.—See PURCHASE-MONEY.

LIEN—

Varieties of, 333.

Foundation of equitable jurisdiction regarding, 333.

Distinctions among liens, 333-4.

Vendor's, for unpaid purchase-money, 136-139.

Waiver of, 137.

Lien not lost by taking a collateral security *per se*, 137-8.

Against whom lien may be enforced, 139-140.

Vendor may lose his, by negligence, 140-141.

Vendee's, for prematurely paid purchase-money, 141-2.

Trustee has, for expenses of renewing lease, 144.

Person paying premiums on policy has, 144.

Life-tenant has, for what improvements, 143-144.

Covenant to purchase does not create, on lands purchased, 235-6.

Particular, distinguished from general, 333-4.

On lands, distinguished from lien on goods, 334.

On papers, distinguished from lien on funds, 334-6.

Solicitor has, on deeds and papers of his client, 334.

And on fund realised in a suit, 334-5.

On deeds, as against third parties, is commensurate with client's right at time of deposit, 335.

Prevents set-off against sum due from his client, 335.

Banker's lien, 336.

Quasi-liens, charge in the nature of a trust, 336.

Vendor's, for money advanced for improvements, 336.

None, where two purchase and one pays the purchase-money, 336.

Joint-tenants, for costs of renewing lease, 336.

LIMITATION, STATUTES OF—

In what sense equity bound by, 22, 23.

Charities barred by, like individuals, 122-3.

Time runs in favour of constructive trustees, 154-5.

As between trustees and *cestui que trust*, no bar, 166.

Creditors having a charge only, barred in twenty years, 266-7.

Rights of mortgagee in possession under, 303-4.

When agent may plead, 154-5.

LOCKE KING'S ACT—

Exoneration of personal estate from mortgage debts, 273-274.

Did not extend to mortgages on leaseholds, 276.

Amending Act (1877), extends to leaseholds, 276.

General construction of Act, 276-278.

See ASSETS; EXONERATION.

LORD CRANWORTH'S ACT—

Trustee's receipt for *any* trust moneys a good discharge, 114-117.



## LORD ST. LEONARDS' ACT—

Purchaser's exoneration from liability under, 114-117.

Power to sell or mortgage implied by charge of debts, 114-117.

## LUNATICS—

Reconversion of property of, 206.

Election by, 230.

Unsoundness of mind is no ground of jurisdiction in equity, 412.

Jurisdiction was in Exchequer on inquisition, 412-3.

Exchequer jurisdiction in lunacy transferred to Lord Chancellor,  
413-414.

Lords Justices acquired and now exercise jurisdiction, 414.

What proceedings would be a contempt on lunacy, 415.

Cases for Chancery, 415.

Conversion of lunatic's estate, 416-417.

His interest alone considered, 416.

His representatives have no equities between themselves. They take  
the fund in the character in which it is actually found, 417.

See also FRAUD IN EQUITY.

## MAINTENANCE.—See CHAMPERTY.

## MAINTENANCE OF INFANTS—

Father liable for, of his children, 410.

And mother under Married Women's Property Act, 410.

When father entitled to an allowance for, 410.

How allowance regulated, 410-411.

## MARITAL RIGHT.—See FRAUD ON MARITAL RIGHT; MARRIED WOMAN.

## MARRIAGE—

Gifts or legacies on condition of, with consent of parents or guardians, 459.

Marriage brokerage contracts void, 465.

Contracts in general restraint of, 466.

## MARRIAGE ARTICLES—

Executory trusts in, 62.

Construed so as to make strict settlement, 62, 63.

## MARRIAGE CONSIDERATION—

Under 27 Eliz., c. 4, 85.

Post-nuptial settlement in pursuance of ante-nuptial parol agreement, *quære*, valid or not, 85, 86.

Who within scope of, 90.

## MARRIAGE SETTLEMENTS.—See SETTLEMENTS.

## MARRIED WOMAN—

Presumption of advancement in favour of, 127. See ADVANCEMENT.

Acquiescence in breach of trust by, 168.

Reconversion by, 206-207.

Husband not put to election under invalid will of, 223.

Election by, 228-9.

Mortgage by husband of her estate of inheritance, 322-3.

Rights of, at common law, 344-5.

**MARRIED WOMAN—***(continued.)*

- Her husband entitled in consideration of maintaining her, 304-5.
- Interference of equity in creating separate estate. See **SEPARATE ESTATE**.
- Interference of equity in decreeing wife an equity to a settlement. See **EQUITY TO A SETTLEMENT**.
- See also **FRAUD ON MARITAL RIGHTS ; PARAPHERNALIA ; PIN-MONEY SURVIVORSHIP, WIFE'S RIGHT OF**.

**MARSHALLING OF ASSETS—**

- Principal of, explained, 284, 285.
- I. As between creditors, simple contract creditors permitted to stand in the place of specialty creditors, as against realty, 285.
- Also in case of mortgagee or unpaid vendor, who exhausts the personalty, 285-286.
- Realty now assets for payment of all debts, 3 & 4 Will. IV., c. 104, 286.
- Priority of creditors abolished, 286.
- None except between creditors of same person, 286.
- II. As between beneficiaries entitled, principle of, how derived from order of liability of divers properties, 287-289.
- General principle, application of, 289.
- Widow's paraphernalia preferred to a general legacy, and all volunteers, 289.
- Right of heir to marshal as to descended land, 290.
- Devisee of lands charged with debts, 290.
- Position of residuary devisee, 290.
- Pecuniary legatees, in favour of, 290-291.
- Specific legatees and devisees, contribute rateably *inter se*, 291.
- If specific devisee or legatee take subject to a burden, he cannot compel the others of the same class to contribute, 291-2.
- Between legatees, where certain legacies are charged on real estate, and the others are not so charged, 292.
- Where legacy charged on real estate fails, it is not transmissible, as being not so charged, 293.
- None in favour of charities, 293-4.

**MARSHALLING OF SECURITIES—**

- General rules regarding, 287.
- As against sureties, 493-4.

**MAXIMS OF EQUITY—**

- Equity will not suffer a wrong without remedy, 18, 19.
- Equity follows the law, 19-23.
- Where equities are equal, the first in time shall prevail, 23, 25.
- Where there is equal equity, the law must prevail, 25-42.
- He who seeks equity must do equity, 42-44.
- He who comes into equity must come with clean hands, 44.
- Delay defeats equities, 44-45.
- Equality is equity, 45, 46.
- Equity looks to the intent rather than the form, 46, 47.
- Equity looks on that as done which ought to have been done, 47, 48.
- Equity imputes an intention to fulfil obligations, 48.

**MISREPRESENTATION.—**See **FRAUD IN EQUITY**.

## MISTAKE—

## (a.) Being mistake of law,—

*Ignorantia legis neminem excusat*, 432.

An agreement under a mistake of law binding, 433.

Apparent exceptions where there are circumstances of fraud, 433.

Where a party acts under ignorance of a plain and well-known principle of law, it creates a presumption of fraud, or *mala fides*, 433-4.

Surprise combined with a mistake of law remedied, 434-5.

Where mistake arises on a doubtful point of law, a compromise will be upheld, 435.

Family compromises upheld on this ground, 435-6.

If there be no *suppressio veri* or *suggestio falsi*, but a full disclosure, 435-6.

There must be a full and fair communication of all the material circumstances, 436.

No relief where position of parties has been altered, 436.

Unless there has been gross imposition, 437.

Equity will not aid against a *bonâ fide* purchaser for value without notice, 437.

## (b.) Being mistake of fact,—

Mistake of fact as a general rule relieved against in equity, 437.

1. Fact must be material, 437.

Relief given though mistake is mutual, 437-8.

2. Must be such as party could not get knowledge of by diligent inquiry, 438.

3. Party having knowledge must have been under an obligation to discover the fact, 438.

4. Where means of information are equally open to both, no relief, if no confidence reposed, 438-9.

Grounds generally for equitable relief, 439.

Oral evidence admissible in case of accident, mistake, or fraud, 439-440.

Mistake, not of law, in a written document, may be proved by extrinsic evidence, and the instrument rectified, 440.

May be implied from nature of the case, 440.

A partnership debt, though joint at law, may be treated in equity as joint and several, 440.

When obligation exists by virtue of covenant alone, it must be measured by the covenant, 440-441.

Rectification of mistakes in marriage settlements, 441.

1. Where both articles and settlement before marriage, 441.

2. Where pre-nuptial settlement purports to be in pursuance of articles, 441-2.

3. Extrinsic evidence admissible to show that pre-nuptial settlement was made in pursuance of articles, 442.

4. Settlement after marriage, 442.

Mistake in marriage contracts must be of both parties, 443.

Where instrument delivered up or cancelled under a mistake, 443.

Defective execution of powers, 443.

Mistakes in wills, 443-5.

Mere misdescription of legatee will not defeat legacy, 444.

Legacy obtained by false personation, *secus*, 445.

Revocation of legacy on a mistake of facts, 444-5.

Party claiming relief must have superior equity, 445.

No relief between volunteers, 446.

## MISTAKE—(continued.)

Or where defect is declared fatal by statute, 446.

See ACCIDENT ; EXTRINSIC EVIDENCE.

MODUS ET CONVENTIO VINCUNT LEGEM, 295.—See MORTGAGE.

## MORTGAGE—

Definition of, 295.

At common law, an estate upon condition, 295.

Forfeiture at law on condition broken, 295-6.

Interference of equity, 296.

Equity operates on the conscience of the mortgagee, 296.

Held a mere pledge, with right to redeem, notwithstanding forfeiture at law, 296-7.

Debtor cannot at time of loan preclude himself from his right to redeem, 297.

Right of pre-emption may be given to mortgagee, 297.

Conveyance, with option to repurchase, 297-8.

Circumstances distinguishing a, from a sale with right of repurchase, 298.

Effects of this distinction, 298.

In a sale with right of repurchase, time is strictly to be observed, 298.

In a sale with right of repurchase, if purchaser die seised, money goes to real representative, 298.

Forms of mortgage now in disuse,

1. *Vivum vadium*, lender to pay himself from rents and profits, 299.

2. *Mortuum vadium*, creditor took rents and profits without account, 299.

3. Welsh mortgage, mortgagor may redeem at any time, 299-300.

Nature of equity of redemption, in modern mortgage, 300.

An estate in land, over which mortgagor has full power, subject to encumbrance, 300.

Devolution of equity of redemption same as of the land, 300-301.

Who may redeem, 301.

Successive redemptions, order of, and general principle regarding, 301-302.

Arrears of interest recoverable on redemption, 302.

Time to redeem, 302-303.

Statutes of limitation, effect of, under old and under present law, 303-304.

The equity of the mortgagor after forfeiture recognised by 15 & 16 Vict., c. 76, 304.

Same equity further recognised by Judicature Acts (1873-75), 304-305.

Mortgagor in possession not accountable for rents and profits, 305.

Mortgagor in possession restrained from waste if security be insufficient, 305.

Mortgagor tenant at will to mortgagee, 305-6.

Mortgagor cannot make leases binding on mortgagee, 306.

Mortgagee entitled to possession, 306.

Mortgagee shall not charge for personal trouble, 306.

West India estates, 306-7.

Stipulation for higher rate of interest, if in arrear, will be relieved against as a penalty, 307.

Fines in Building Society mortgages, penal in character, 307.

**MORTGAGE—(continued.)**

Mortgagee must keep estate in necessary repair with surplus rents, 307.

Mortgagee in possession must account, 308.

Even although he has assigned the mortgage, 308-9.

But only for what he has, or but for wilful default might have, received, 308-309.

Mortgagee until payment cannot be compelled to produce his title-deeds, 309.

Cannot take a valid lease from mortgagor, 309.

Cannot in equity make a binding lease, 309-310.

Renewing lease, holds subject to mortgagor's equity, 310.

Of advowson, cannot present to vacancy, 310.

Cannot fell timber unless security be insufficient, 310.

The doctrine of tacking,—

Its principle, 311.

Its origin, 311.

Its rules, 311-316.

Where legal estate is outstanding, mortgages rank in order of time, 315.

Unless one have better right to call for legal estate, 315.

Priority may be lost by fraud, 316.

A mortgagee denying his mortgage, so as to mislead an intending mortgagee, 316.

Priority may be lost by negligence, 317.

Consolidation of mortgages, 317-318.

Distinguished from tacking, 317-318.

Necessary limit to, 318.

Special remedies of mortgagee, 319-321.

(1.) Foreclosure, 319.

How affected by statutes of limitation, 319-320.

(2.) Sale by court, under 15 & 16 Vict., c. 86, 320.

Power of sale in mortgage deed, 320.

Powers under 23 & 24 Vict., c. 145, 320-321.

Compensation on compulsory purchase, 321.

(3.) Remedy under attornment clause, 321.

Mortgagee may pursue all his remedies concurrently, 321-2.

If mortgagee foreclose first, and then sue on the covenant, he opens the foreclosure, and mortgagor may redeem, 322.

He will be restrained from suing, if he have not the estate in his power, 322.

The equity of redemption follows the limitations of the original estate, 322-3.

By husband of his wife's estate, 323.

The equity of redemption results to the wife, 323.

Unless different intention manifested, 323.

By husband of husband's own estate, 323.

See **MORTGAGE, EQUITABLE** ; **MORTGAGES OF PERSONALTY** ; **PLEDGE** ; **TACKING** ; **CONSOLIDATION** ; **FRAUDULENT GIFTS**.

**MORTGAGE EQUITABLE—**

Of realty by deposit of title-deeds, 324.

Statute of Frauds requires contracts concerning lands to be in writing, 324.

Deposit of title-deeds being an agreement executed not within the statute, 324.

MORTGAGE EQUITABLE—(*continued.*)

Origin of the doctrine, 325.

When deposit of title-deeds covers further advances with interest, 325.

Deposit for the purpose of preparing a legal mortgage, 326.

Parol agreement to deposit deeds for money advanced, 326.

All title-deeds need not be deposited, 326.

Equitable mortgagee parting with title-deeds to mortgagor, 326-7.

Has priority to a subsequent legal mortgagee, with notice, 327.

Legal mortgagees postponed to equitable mortgagee, if former guilty of fraud or gross negligence, 327.

But not if he have made *bond fide* inquiry after the deeds, 327.

Gross and wilful negligence tantamount to fraud, 327.

Absence of inquiry after deeds presumptive evidence of fraud, 327-8.

## MORTGAGES OF PERSONALTY—

Differences between, and pledges,—

(a.) In their own nature, 329.

(b.) As to remedies, 329-330.

Differences between, and mortgages of realty,—

(a.) As to remedies, 330.

(b.) As to tacking, 331-2.

See PLEDGE.

## MORTUUM VADIUM.—See MORTGAGE.

## NATURAL EQUITY—

Cannot always be enforced in courts, 1, 2.

## NATURAL JUSTICE.—See NATURAL EQUITY.

## NE EXEAT REGNO—

Writ of, to prevent a person leaving the realm, 623.

Granted in private cases with caution, 623.

Only in cases of equitable debts, as a general rule, 623.

Also, where alimony decreed, and husband intends to leave the jurisdiction, 623.

Or where there is an admitted balance, but plaintiff claims a larger sum, 624.

The debt must be certain in its nature, 624.

Judicature Acts, effect of, 624.

Writ issues summarily under the Absconding Debtor's Act, 1870, 624.

## NEGLIGENCE—

*Vigilantibus non dormientibus æquitas subvenit*, 44, 45.

Gross, disentitles plaintiff to relief, and often postpones him to others, 140-141.

Solicitor's liability for, 319.

See LIENS; MORTGAGES; ACCIDENT, &c.

## NEGOTIABLE INSTRUMENT.—See BILL OF EXCHANGE.

## NON-NEGOTIABLE INSTRUMENT.—See BILL OF EXCHANGE.

## NO WRONG WITHOUT A REMEDY IN EQUITY—

Meaning of this maxim, 18.

Its limits, 18, 19.

## NOTICE—

Of assignment of chose in action, effect of, 98, 99. See EQUITABLE ASSIGNMENT.

Purchaser with, a trustee to extent of prior claim of which he had notice, 35, 36.

*Secus*—Sub-purchaser with notice, if his vendor bought without, 36, 37.

Or sub-purchaser without notice, if his vendor bought with, 36, 37.

Of voluntary settlement, subsequent purchaser not affected by, 37.

May be actual or constructive, 37.

Rule as to actual notice laid down in *Lloyd v. Banks*, 37, 38.

Constructive notice of two kinds—

1. Where actual notice of a fact, which would have led to notice of other facts, 38, 39.

2. Where inquiry purposely avoided to escape, 39.

Mere want of caution not constructive, 39, 40.

Inquiry after title-deeds must be made, 40.

Notice to agent is notice to principal, 40-42.

Must have been given in the same transaction, 41.

See MORTGAGE.

## NOTICE, PURCHASER FOR VALUABLE CONSIDERATION WITHOUT—

Defence of purchase for valuable consideration without notice, 26, 27.

General remarks as to, 27.

When purchaser obtains legal estate at time of purchase, 27, 28.

When purchaser gets in legal estate subsequently, 28.

When purchaser has best right to call for legal estate, 28, 29.

Defence good when plaintiff having legal estate applies to auxiliary jurisdiction, 30-33.

*Secus*, where Chancery has concurrent jurisdiction, 33.

Where legal estate outstanding, incumbrancers take in order of time, 33, 34.

Where plaintiff has a mere equity, the court will not interfere, 34, 35.

Purchaser with notice cannot protect himself by getting in legal estate from express trustee, 164-5.

## NUISANCE—

Public, abated by indictment, and sometimes also by injunction on an information filed, 569.

Where it causes special damage, 569.

Injunction in case of private, 569-570.

Court will not interfere where damages a sufficient remedy, 570.

But will where damage is irreparable, 570.

Ancient lights, 570-1.

Right to lateral support of soil, 571.

In case of pollution of streams, 571-2.

## ONCE A MORTGAGE—

Always a mortgage, 297.

## OPTION TO PURCHASE—

Conversion depending upon, 187.

(a.) Option previous to will, 187-188.

OPTION TO PURCHASE—(*continued.*)

- (1.) General devise, who entitled to moneys, 187-188.
- (2.) Specific devise, who entitled to moneys, 188-189.
- (b.) Option subsequent to will, 189-190.
  - (1.) General devise, who entitled to moneys, 190.
  - (2.) Specific devise, who entitled to moneys, 189-190.

See CONVERSION.

## PARAPHERNALIA—

- Nature of, 372.
- Old family jewels are not, 373.
- When post-nuptial gifts from husband are, 373.
- Gifts from stranger are not, 373.
- Wife cannot dispose of, during husband's life, 373.
- Husband cannot dispose of, by will, 373.
- Are subject to husband's debts, 373.
- Widow's claim to her, preferred to general legacies, 373-4.
- Widow is entitled to redemption of, out of personal estate of deceased husband, 374.

## PAROL EVIDENCE—

- Admissible in favour of resulting trust, to show actual purchaser, 125.
- Or to rebut presumption of advancement, 126-7.
- Inadmissible, *dehors* the will, to raise question of election, 228.
- In cases of satisfaction, when and where not admissible, 257-9.
- See EXTRINSIC EVIDENCE.

## PARTITION—

- Origin of equitable jurisdiction in, 585.
- Writ of partition at law inadequate, 585-6.
- Reversioner cannot maintain suit for, 586.
- Nor can person claiming under disputed legal title, 586.
- Provisions of Trustee Act (1850), where persons interested are under disability, 586-7.
- How made, 587.
- Difficulties, where property small, of carrying into effect, 587-8.
- Now remedied by sale under Partition Acts (1868 and 1876), 588.
- Sale in lien of partition, how and when directed, 588.

## PARTNERSHIP—

- Equity has a practically exclusive jurisdiction, 495.
- Enforces specific performance of agreement to enter into, for definite time, where acts of part-performance, 495-6.
- Injunction against omission of name of one of partners, 496.
- Injunction against carrying on another business, 496.
- Injunction against destruction of partnership property, or exclusion of partner, 496-7.
- Courts of equity will not decree specific performance of articles of, where remedy at law is entirely adequate, 497.
- Nor of an agreement to refer to arbitration, unless under Common Law Procedure Act (1854), 497.
- Dissolution of partnership, modes of,—
  - (1.) By operation of law, 497-8.
  - (2.) By agreement of parties, 498.
- Partnership at will may be dissolved at any moment, 498.



**PARTNERSHIP—***(continued.)*

- Dissolution by event provided for, 498.
- Partnership continuing after term agreed on, is partnership at will, on old terms, 498-9.
- (3.) By decree of court, 499.
  - Where induced by fraud, 499.
  - Gross misconduct and breach of trust, 499.
  - Continual breaches of contract, 499.
  - Wilful and permanent neglect of business, 500.
  - Mere disagreement or incompatibility of temper not a ground for dissolution, 500.
  - Unless it be such as to make it impossible to carry on the business, 500.
  - Insanity of partner whose skill is indispensable, 500.
  - Share in, a right to money, 500.
  - Account on dissolution, 501.
  - Receiver appointed only in case of dissolution, 501.
  - Account where no dissolution is prayed, 501.
- Partner making advantage out of partnership accountable to other partners, 501.
- Representatives of deceased partner, entitled to an account, have no lien on partnership estate, 501-2.
- In equity, land forming an asset of, is money, 502.
- Personal representative takes, 502.
- Immaterial whether land acquired by purchase or devise, if "involved in" the business, 502.
- Creditors may, on decease of one partner, go against survivors, or against the estate of deceased, 502-3.
- Separate creditors paid out of separate estate before partnership creditors, 503.
- Partnership creditors paid out of partnership funds before separate creditors, 503.
- Two firms having a common partner could not sue each other at law, but might in equity, 503.
- At law one party cannot sue his co-partner in a partnership transaction—he may in equity, 503.

**PARTNERSHIP PROPERTY.**—See **COMMERCIAL PURCHASES ; JOINT-TENANCIES.**

**PART-PERFORMANCE.**—See **SPECIFIC PERFORMANCE.**

**PATENTS.**—See **INJUNCTION.**

**PAYMENTS, APPROPRIATION OF.**—See **APPROPRIATION OF PAYMENTS.**

**PEACE, BILLS OF.**—See **BILL OF PEACE.**

**PENALTIES.**—See **FORFEITURES, PENALTIES, AND.**

**PENDENTE LITE—**

- Purchase of interest, considered as maintenance or champerty, when, and when not, 102, 103.

**PENSIONS—**

- Assignment of, contrary to public policy, 101.

## PERFORMANCE—

Equity imputes an intention to fulfil an obligation, 232.

1. Covenant to purchase land, and land is purchased, 232-237.

The thing given must be of the same kind, 235.

Consent of trustees not essential, 235.

Covenant may be executed in part, 235.

Covenant to purchase does not create a lien on lands purchased, 235-236.

Right of *cestui que trust* to follow trust-fund, distinguished from performance, 236-237.

2. Covenant to pay or leave by will, and share under the Statutes of Distribution, 237-240.

- (a.) When husband's death occurs *at or before* time when the obligation accrues, distributive share is a performance, 237-239.

Whether intestacy immediate or resulting, 238.

- (b.) Where husband's death occurs *after* obligation accrues, distributive share is not a performance, 239-240.

See SATISFACTION.

PERPETUATE TESTIMONY, BILL TO.—See TESTIMONY, BILL TO PERPETUATE.

## PERSONALTY—

Parol declaration of trust of, binds, 70-75.

Where donor assigns his equitable interest in, 70-75.

An imperfect transfer of, not aided in favour of a volunteer, 68, 69.

An imperfect transfer of, aided in favour of a purchaser, 68, 69.

See TRUST; ASSETS.

## PIN-MONEY—

Nature and object of, 370.

Differs from separate estate in some respects, but resembles it in others, 371.

Wife can claim only one year's arrears of, 371.

Unless husband has promised to pay in full, 371-2.

Where husband has provided apparel, a satisfaction of, 372.

Wife's executors cannot claim any arrears of, 372.

## PLEDGE—

Difference between, and mortgage of personalty, 329.

- (a.) In nature, 329.

- (b.) As to remedies, 329.

Remedy of pledgor is at law, 329.

Remedy of pledgee in equity, 330.

Pledgee may sell without action, 330.

Difference between, and mortgage of reality, 330-331.

Tacking of debts, 331-332.

See MORTGAGES OF PERSONALTY.

## POLICY OF ASSURANCE—

Assignable in equity, 72-74, 94, 95.

Assignable now at law also, 74, 75, 95, 96.

Person paying premiums has lien on, 144.

## PORTIONS—

Leaning against double, 252-3.

See SATISFACTION.

**POSSIBILITIES—**

Coupled with interest in real estate may be assigned at law, 95.  
In personalty, assignable in equity, 94, 95.

**POST-NUPTIAL SETTLEMENT.—See SETTLEMENT.****POST-OBIT BOND—**

When relieved against, 477. See **FRAUD IN EQUITY**.

**POWER OF ATTORNEY—**

To receive money with direction to pay to creditor, not equitable assignment, 97, 98.

**POWERS—**

Defective execution of, when aided, 426-8.  
Execution of, must always be *bond fide* for the end designed, 480.  
Secret agreement in fraud of object void, 480.  
So to appointment by father to sickly infant, 480-1.  
Doctrine of illusory appointments abolished by 1 Will. IV., c. 46, 481.  
Under Powers Amendment Act, 1874, 481.

**POWERS IN NATURE OF TRUSTS—**

Court compels their execution, although wholly unexecuted, III.  
General intention in favour of a class carried out, if particular intention fail, III.  
Such powers in effect trusts, subject to power of selection, III, II2.  
When court selects, the shares given are equal, II2, II3.

**POWER OF SALE—**

Implied, when a charge of debts, II5-II7.

**PRECATORY WORDS—**

No trust if there is a discretion, 104.  
Recommendation must be imperative, 105.  
The court leans against construing precatory words as imperative, 107.

**PRE-EMPTION—**

Right of, in mortgagee, 297.

**PREFERENCE OF CREDITOR—**

When, and when not, allowable, 263-264.

**PRESUMPTION.—See ADVANCEMENT; IMPLIED TRUSTS; RESULTING TRUSTS; FRAUD IN EQUITY.****PRINCIPAL—**

Notice to agent is notice to, when, 40, 41.  
Mandate from, to agent not communicated to a third person, does not create a trust, 97-99.  
Agent cannot make profit at expense of his, 153.  
Good faith essential in dealings between, and agent, 474.  
Bill for an account by, against his agent, 506-7.  
Agent can have interpleader against his, when, 592-3.

**PRINCIPLES OF EQUITY.—See EQUITY.****PROMISSORY NOTE.—See BILL OF EXCHANGE.**

## PUBLIC OFFICERS—

Assignment of salaries of, 101.

PUBLIC POLICY.—See EQUITABLE ASSIGNMENT; FRAUD IN EQUITY.

## PURCHASE-MONEY—

Liability of purchaser to see to application of, 113-117.

(a.) If purchase of personal property, purchaser exonerated, 113-114.

(b.) If purchase of real property,—

(aa.) Where charge of debts generally (with or without legacies also), purchaser exonerated, 114.

(bb.) Where charge of or trust for specific debts or for legacies and annuities only, purchaser not exonerated, 114.

Exemption of purchaser from all liability for, under Lord St. Leonards' and Lord Cranworth's Acts, 114-117.

## PURCHASER—

Defence of purchase for valuable consideration without notice, 26, 27.

Where, obtains legal estate at time of purchase, 27, 28.

Where, gets in the legal estate subsequently, 28.

Where, has best right to call for legal estate, 28, 29.

Where plaintiff, having legal estate, applies to auxiliary jurisdiction of equity, defence good, 30-33.

Rule inapplicable where Chancery has concurrent jurisdiction, as in bill for dower, 33.

Where legal estate is outstanding, incumbrancers take in order of time, 33, 34.

27 Eliz., c. 4, for protection of, 83.

Voluntary settlement void as against subsequent, 74, 83.

Mortgagee is, but judgment creditor is not, 84.

For value of heir-at-law, or devisee of voluntary donor, not within 27 Eliz., c. 4, 84.

Nor is one claiming under second voluntary conveyance, 84.

*Bond fide*, under 27 Eliz., c. 4, who is, 84, 85.

Liability of, to see to application of purchase-money, 113-117.

Of personalty exonerated, 113-114.

Where trust of or charge on lands for payment of debts and legacies, exonerated from liability, 114.

Trustees' power of giving receipts to, under 22 & 23 Vict., c. 35, and 23 & 24 Vict., c. 145, 114-117.

Trustees and others in like capacity cannot in general be, from *cestui que trust*, 152-3.

With notice cannot protect himself by getting in the legal estate from an express trustee, 164-5.

No discovery against, without notice, 30-33, 601.

PURCHASES BY TRUSTEES.—See TRUSTEES.

QUIA TIMET.—See BILL QUIA TIMET.

## QUI PRIOR EST TEMPORE POTIOR EST JURE—

Application of this maxim, and its limits, 23, 24.

True expression of the maxim, 24, 25.

RANGE OF INVESTMENTS.—See INVESTMENTS; TRUSTEES.

RECEIPTS, POWER OF GIVING.—See TRUSTEES ; EXECUTORS ; PURCHASER, &c.

RECONVERSION—

1. By act of parties, 203-210.
  - By absolute owner, 203-204.
  - By owner of an undivided share, 204-5.
    - Of money to be turned into land, 204.
    - Of land to be converted into money, 204-205.
  - By remainder-man, 205.
  - By infants, 205-206.
  - By lunatics, 206.
  - By married women, 206.
    - Money into land, 206-207.
    - Land into money, 207-208.
- How election to take property in actual state is shown, 208.
  - By express direction, 208.
  - By implied direction from conduct, 208.
    - As to land into money, 208-209.
    - As to money into land, 209-210.
2. By operation of law, 210-212.
  - Money at home and no declaration regarding it, 210, 211.
  - Examples of money being at home and no such declaration, 211-212.

RECTIFICATION OF CONTRACT—

- Equity compels, on ground of mistake or fraud, 439.
- Mistake may be implied from nature of transaction, 439.
- Settlement may be rectified in conformity with marriage articles, when, 441 2.
- Parol evidence of mistake, when admitted in suits for specific performance, 541-2.
- Conveyancer relieved against mistake in deed of his own drawing, 540.

REDUCTION INTO POSSESSION—

- A duty of trustee, for security of trust funds, 161.
- Of wife's *chose*, what is and what is not, 390-1.

RELEASE—

- By *cestui que trust* bars proceedings for breach of trust, 168.

REMEDIES—

- Of *cestui que trust* against trustees and others. See TRUSTEES.
- Of mortgagors and mortgagees. See MORTGAGE ; MORTGAGE, EQUITABLE ; MORTGAGES OF PERSONALTY.
- In cases of fraud. See FRAUD IN EQUITY.

REMUNERATION.

- None allowed to trustees, 48.
- Solicitor allowed only costs out of pocket, 151.
- Solicitor may stipulate for, 151.

RENEWAL OF LEASE—

- Trustee renewing in his own name, a constructive trustee of renewed lease, 142.
- So a tenant for life, 142.
- So a partner renewing lease of partnership premises, 142.

## RE-PURCHASE—

Right of, in mortgagor, 297-8.

RESULTING TRUST.—See IMPLIED AND RESULTING TRUSTS.

RESULTING USE.—See TRUST.

## RETAINER BY EXECUTOR—

Right of, and limits thereto, 283.

## REVERSIONARY PROPERTY—

Conversion of, by trustees, 163.

Assignment of married woman's, 388-9.

ROMAN LAW.—See CIVIL LAW.

RULE IN SHELLEY'S CASE.—See SHELLEY'S CASE, RULE IN.

SALVAGE MONEYS.—See POLICY OF ASSURANCE.

## SATISFACTION—

Presupposes intention, 241.

Distinguished from performance, 241.

1. Of debts by legacies, 241-245.

A legacy imports bounty, 241-242.

If legacy be equal to debt, it is a satisfaction, 242.

If legacy be less than debt, it is not a satisfaction, 242.

If greater than debt, it is a satisfaction, 242.

Where debt contracted after will, no presumption of, 242.

Circumstances rebutting the presumption, 242.

Direction in will for payment of debts *and* legacies, effect of, 243.

Direction in will to pay debts alone, effect of, 243.

Time for payment of legacy differing from that of debt, effect of, 243-244.

Contingent legacy never a satisfaction, 244-245.

The modes of less, 245.

2. Of legacies by subsequent legacies, 245-247.

Two legacies under the same instrument, if equal, not cumulative in absence of internal evidence to the contrary, 245-246.

Two legacies under the same instrument, if unequal, cumulative, 246.

By different instruments, *primâ facie* cumulative, whether equal or unequal, 246.

Unless same motive expressed and same sum, 246-247.

Extrinsic evidence admissible where the court raises the presumption, 247.

Where the court does not raise the presumption, inadmissible, 247.

3. } Of legacy by portion, and of portion by legacy, 247-257.  
4. }

Rule does not apply to legacies and portions to a stranger, 248.

Or to illegitimate child, 248.

Unless the legacy and portion be for the same specific purpose, 249.

Presumption founded on good sense, 249-250.

SATISFACTION—(*continued.*)

Presumption applies where donor has placed himself *in loco parentis* to donee, 250.

What is putting oneself *in loco parentis*, 250-252.

A person meaning to put himself *in loco parentis* with reference to providing for the child, 251-252.

Leaning against presumption of double portions, 252-253.

Same principles applicable when settlement comes before will, 253-254.

Not a question of satisfaction of debt, 254-255.

Where settlement comes first, persons taking under it are purchasers with right to elect between settlement and will, 255.

Sum given by second instrument, if less, is *pro tanto*, 256.

Legacy to a child, or to a wife, to whom testator is indebted, 256-257.

Advancement by father to child to whom he is indebted, 257.

Extrinsic evidence, admissibility of, 257-259.

A presumption against the apparent intention of instrument may be rebutted by parol evidence, but not *vice versa*, 258.

Admitted only to construe the will, not to import extrinsic matter, 258-259.

## SECRET TRUSTS—

Where will makes no disposition of beneficial interest, effect of, 109-110.

Where will makes apparent disposition of beneficial interest, effect of, 110-111.

(a.) When a fraud, 110-111.

(b.) When no fraud, 110-111.

## SECURITIES, APPROPRIATION OF.—See APPROPRIATION OF SECURITIES.

## SECURITIES, MARSHALLING OF.—See MARSHALLING OF SECURITIES.

## SEPARATE ESTATE—

Protective jurisdiction of Chancery in permitting married woman to hold separate estate, 345-346.

*Feme covert* cannot at Common Law hold property apart from her husband, *secus* in equity, 345-6.

Separate property before the "Married Women's Property Act," 1870, how created, 346-7.

By ante-nuptial agreement, 346-7.

By post-nuptial agreement with the husband, 347.

On desertion by the husband, and by 20 & 21 Vict., c. 85, 347.

Gifts from husband to wife, or by stranger, 347.

Trade property of wife trading separately, 348.

Under express limitation to separate use, 348.

Interposition of trustees unnecessary to existence, 348.

Husband a trustee for wife, 348.

Words creating a separate use, 349.

What words insufficient, 349.

Wife's power of disposition over separate estate, 350-351.

She may dispose of personalty without his consent, 350.

She may dispose of life estate in realty, 350.

## SEPARATE ESTATE—(continued.)

And of her fee-simple estate by will or deed as if a *feme sole*, 350-1.

Separate property liable for her breach of trust, 351-2.

Unless there be a restraint against anticipation, 351-2.

The savings of income of separate estate are also, 352.

She may permit her husband to receive it, 352-3.

She is entitled to only one year's account against him, 353.

He takes undisposed of, at her death *jure mariti*, or as her administrator, 353.

Property limited to such uses as *feme covert* may appoint, is not, 353.

Differences between separate property and general power of appointment in *feme covert*, 354-358.

(1.) Separate property only recognised in equity; her right to execute a power recognised at law and in equity, 354.

(2.) *Feme covert* cannot contract a debt to bind her appointed property; but her separate property liable, 354-7.

(3.) Appointees under a power rank in order of date, but creditors of separate estate rank *pari passu*, 357-8.

Though generally regarded as a *feme sole* in equity as to her separate estate, she could not originally bind that estate with debts in equity, 356.

Rule relaxed, 356-7.

Her separate estate was bound by an instrument under seal, 356.

By bill of exchange or promissory note, 356.

By ordinary written agreement, 356-7.

Equity would not allow her to bind her separate estate on a common *assumpsit*, 357.

Erroneously held that charging the separate estate was executing a power of appointment, 357.

Power and separate property confounded, 357.

Appointees under a power rank in order of time, 357-8.

Creditors of separate estate take *pari passu*, 357-8.

Courts now hold that, to the same extent that she is regarded as *feme sole*, she may contract debts, 358.

Her verbal engagements now binding on her separate estate, 358-9.

No personal decree against a *feme covert*, 359.

Cannot be made a bankrupt, 359.

General engagements bind the *corpus* of her personality, rents, and profits of her realty, 359.

Now also the *corpus* of her realty, 359.

Execution against, 359-361.

Creditor's suit for administration of, 360.

The origin of restraint on anticipation, 360-361.

*Feme covert* prohibited from taking the income before actually due, 360-361.

A man or *feme sole* cannot be so prohibited, 360-361.

Restraint attaches to future covertures, 361.

She has a *jus disponendi* over her, 361.

If restrained, she is entitled to the present enjoyment exclusively, 361.

Separate estate, with or without restraint, exists only during coverture, 361-2.

Separate use will arise on marriage, 362.

Restraint on alienation depends on, and is a modification of, separate estate, and has no independent existence, 362.

When discoverd, she has full powers of alienation, 362.



SEPARATE ESTATE—(*continued*.)

- In what cases the trust will be wholly destroyed, so as not to attach on marriage, 362-3.
- If property remain *in statu quo*, husband must take it with trusts impressed upon it, 363.
- If she sell it, and receive the purchase-money, the trust is destroyed, 363.
- What words will restrain alienation, 364.
- What words held not sufficient, 364-5.
- Court of equity cannot dispense with fetter on alienation, 365.
- Unless by Act of Parliament, 365.
- Under Married Women's Property Act, 33 & 34 Vict., c. 93, 365.
- Distinction between statutory and equitable, 366.
- Items of statutory separate estate,—
1. Wages and earnings of all married women after date of the Act, 366.
  2. Personalty devolving on woman married after the Act *ab intestato*, and sums of money under £200 under any deed or will, 366-7.
  3. Rents and profits of real estate devolving *ab intestato*, 367.
  4. Investments in securities authorised by the Act, 367.
  5. Life policies to the separate use of the wife, 368.
- Summary jurisdiction in questions between husband and wife, as to, 368.
- Married woman's right of action at law in respect of, 368.
- Her liability for debts contracted before marriage, 369, 370.
- Extent of husband's liability for same debts, 369-370.
- Wife's liability for maintenance of husband and children out of, 370.
- See also PIN-MONEY ; PARAPHERNALIA.

## SET-OFF—

- At law, no set-off formerly in case of mutual unconnected debts, 512.
- In connected accounts, balance only recoverable both at law and in equity, 512.
- If demands connected, equity interposed, 512-513.
- As in mutual independent debts where there was mutual credit, 513.
- Though no, at law, 513.
- In cross demands, which if recoverable at law would be subject of, equity relieves, 513-514.
- In winding-up, debts not set off against calls, 515.
- Other cases of no set-off, 515.
- Under Bankruptcy Act, 1869, 515.
- None, of debts accruing in separate rights, 515-516.
- Except under special circumstances, as fraud, 516.
- Law and equity now the same in all these respects, 516-517.

## SETTLEMENT—

- I. Apart from consideration of marriage,—
  - (a.) Voluntary. See VOLUNTARY TRUSTS.
  - (b.) Colourably valuable. See FRAUDULENT TRUSTS AND GIFTS.
- II. In consideration of marriage,—
  - (a.) Where the marriage is to follow,—
 

The marriage is a valuable consideration, 85, 86.

*Secus*, if the marriage a mere cloak of fraud, 86, 87.

Who are within the scope of the marriage-consideration, 90.
  - (b.) Where the marriage is already over,—

SETTLEMENT—(*continued.*)

The marriage is no consideration, or only a meritorious consideration, 85.

*Secus*, if settlement is in pursuance of ante-nuptial articles, 85, 86.

Or if slight value in money is added, 86.

## III. In cases of infants (male and female),—

(a.) Where made with sanction of court under Marriage Act, 4 Geo. IV., c. 76, 409.

(b.) Where made with sanction of court under Infant Settlement Act, 1855, 409.

See also VOLUNTARY SETTLEMENTS; VOLUNTARY TRUSTS.

SETTLEMENT OF ACCOUNTS.—See ACCOUNTS; TRUSTEES.

SETTLEMENT, WIFE'S EQUITY TO.—See EQUITY TO SETTLEMENT.

SETTLEMENT IN FRAUD OF MARITAL RIGHTS.—See FRAUD ON MARITAL RIGHTS.

## SHELLEY'S CASE, RULE IN—

When followed and when not in equity, 61-67.

See EXECUTED AND EXECUTORY TRUSTS.

## SOLICITORS—

When trustees, only allowed costs out of pocket, 151.

May stipulate to receive compensation, 151.

His liability for negligence in failing to discover a mortgage, 319.

Lien on deeds and papers of client, 334.

On fund realised in a suit, 334-5.

*Gifts* from client to, void, 470-471.

May *purchase* from client, when, 471.

Rule as to gifts is absolute, 471.

Solicitor must take no more advantage than his fair professional remuneration, 471.

Agreement to pay gross sum for past business is valid, 471-2.

Also for future business under 33 & 34 Vict., c. 28, 472.

SPECIFIC LEGACY.—See LEGACIES.

## SPECIFIC PERFORMANCE—

Breach of contract at common law renders liable to damages, 521.

In equity contract must in general be exactly performed, 521.

Inadequacy of remedy at law, ground of equitable jurisdiction, 521.

Cases in which equity will not decree,—

(1.) An illegal or immoral contract, 521.

(2.) An agreement without consideration, 522.

(3.) A contract which the court cannot enforce—

(a.) Where personal skill required, 522-3.

(b.) Contract to transfer goodwill alone, 523.

(c.) Contract to build or repair, 523.

(d.) Revocable contract, 523-4.

(4.) A contract wanting in mutuality, 524.

Distinction as to, of contracts relating to realty and personalty, 525.

Contracts concerning lands enforced, as legal remedy inadequate, 525.

Contracts as to personalty generally not enforced, because remedy at law is adequate, 525.

(1.) Contracts respecting personal chattels, 525-528.

SPECIFIC PERFORMANCE—(*continued.*)

- Not enforced, if damages at law are adequate compensation, 525-6.
- Contract as to railway shares enforced, for such shares are limited in number, 526.
- Sale of assigned debts under bankruptcy enforced at suit of vendor, 526-7.
- Where bill lies for purchaser it lies for vendor, 527.
- Contracts as to articles of *vertu*, 527.
- Delivery up to artist of picture painted by himself, 527-8.
- Also of heirlooms and other chattels of peculiar value, 528.
- Where any fiduciary relation exists, 528.
- Statutory powers as to specific delivery, 17 & 18 Vict., c. 125, and now under Judicature Act, 528-9.
- (2.) Contracts respecting land, 529.
- Almost universally enforced, since damages at law no remedy, 529-530.
- Statute of Frauds broken in upon, where it is unconscientious to rely on it, 530.
- Where agreement is confessed by defendant's answer, 530-531.
- Unless defendant, notwithstanding, insists on the defence, 531.
- Where contract is partly performed by party seeking aid, 531.
- Part performance, what it is, 532.
- Acts of part performance must be referable alone to agreement alleged, 532.
- Introductory or ancillary acts not part performance, 532.
- Mere possession of the land not part performance, if held under previous tenancy, 532-533.
- But delivery of possession under contract is, 533.
- Especially if tenant has made improvements, 533.
- Tenant would else be liable as a trespasser, 533.
- Agreement must originally have been cognisable in a court of equity, independently of acts of part performance, 533-4.
- Payment of part or whole of purchase-money is not, 534.
- Repayment will put parties into same position as before, 534.
- Marriage is not part performance, 534.
- Acts of, independently of marriage, take case out of statute, 535.
- Post-nuptial written agreement in pursuance of ante-nuptial parol agreement, enforced, 535-6.
- Representation for purpose of influencing another, which has that effect, will be enforced, 536.
- Where on marriage third party makes representation, on faith of which marriage takes place, he is bound to make it good, 528, 536.
- Unsigned promise by husband to leave property by will not enforced, 537.
- Where agreement concerning land is not put into writing by fraud of one of parties, 537-8.
- Representations of mere intention, or a promise upon honour, not enforced, 538.
- Grounds of defence to suit for specific performance, 538.
- (1.) Misrepresentation by plaintiff having reference to contract, 538-539.
- (2.) Mistake rendering specific performance a hardship, 539.
- Parol evidence of mistake is admissible, 539.

SPECIFIC PERFORMANCE—(*continued.*)

- Statute does not say a written agreement shall bind, but an unwritten agreement shall not bind, 539.
- (3.) Error of defendant although through his own carelessness, 540.  
 But liable for damages at law, 540.  
 Contract not enforced where defendant did not intend to purchase, 541.  
 Effect of mistake, where parol variation set up as defence, 541.  
 Where error arose not in original agreement, but in reducing it into writing, specific performance decreed with parol variation, set up by the defendant, 541-2.  
 Plaintiff cannot obtain specific performance with parol variation of written agreement, 542.  
 Unless the variation be in favour of the defendant, 542-3.  
 The defendant may ask the court to be neutral, unless the plaintiff will perform omitted term, 543.  
 Where a misunderstanding as to terms of agreement, no relief, 544.  
 Subsequent parol variation of written contract, 544.
- (4.) Misdescription, a ground of defence, where it is of a substantial character, 544-5.  
 Whether the misdescription is or not substantial is a matter of evidence, 545.  
 Purchaser not compelled to take freehold instead of copyhold, 545.  
 Under-lease for an original lease, 545-6.  
 Where difference is slight, and a proper subject for compensation, it will be enforced with compensation, 546.  
 As where acreage is deficient, 538, 546.  
 No compensation where there has been fraud, 546.  
 Nor where compensation cannot be estimated, 546-7.  
 Purchaser can compel specific performance with an abatement, 547.  
 Vendor must sell what interest he has, if purchaser elect, 547.  
 Partial performance not compelled where unreasonable or prejudicial to third parties, 547.
- (5.) Lapse of time, when a defence, 548.  
 At law, time always of essence of contract, 548.  
 Equity is guided by nature of case as to time, 548.  
 When lapse of time is a bar in equity, 548.  
 1. Where time was originally of the essence of the contract, 548.  
 2. Where made essence of the contract by subsequent notice, 549.  
 3. Where lapse of time is evidence of *laches* or abandonment, 549.  
 Law and equity now agree, 549.
- (6.) Equity will refuse aid unless a party comes with clean hands, 549.
- (7.) No specific performance where there is great hardship in the contract, 549-550.
- (8.) Or where it involves the doing of an unlawful act, or breach of trust, 550.

SPECIFIC PERFORMANCE—(*continued.*)

(9.) Contract is not established, 550.

(10.) Contract is already executed, 550.

See also INJUNCTION.

STANDING BY.—See ACQUIESCENCE; FRAUD IN EQUITY.

## STATUTES—

52 Hen. III. (Waste), 566.

6 Edw. I., c. 5 (Waste), 566.

13 Edw. I., c. 22 (Waste), 566.

stat. 1, c. 24 (Writ in Chancery), 10, 11.

17 Edw. II., c. 9 (Idiots), 413.

c. 10 (Lunatics), 413.

13 Edw. III., c. 23 (Account), 505.

27 Hen. VIII., c. 10 (Uses), 52-54.

13 Eliz., c. 5 (Fraudulent Conveyances), 80-83, 397-8.

27 Eliz., c. 4 (Voluntary Conveyances), 83-86.

21 Jac. I., c. 16 (Limitations), 303.

12 Car. II., c. 24 (Testamentary Guardian), 402.

29 Car. II., c. 3 (Frauds), 57, 524, 534-563.

s. 4 (Agreement in writing), 85.

ss. 7, 8, 9 (Trusts), 57, 58.

s. 17 (Contracts), 530.

s. 25 (Marital Right), 390.

3 &amp; 4 Anne, c. 16 (Account), 505.

4 Anne, c. 17 (Set-off), 512.

2 Geo. II., c. 22 (Set-off), 504.

8 Geo. II., c. 24 (Set-off), 512.

17 Geo. II., c. 38 (Parochial debts), 262.

13 Geo. III., c. 63 (Evidence *de bene esse*), 606.

47 Geo. III., c. 74 (Simple contract debts), 264, 279.

55 Geo. III., c. 192 (Preston's Act, 1815), 68.

58 Geo. III., c. 73 (Regimental debts), 262.

4 Geo. IV., c. 76 (Marriage of Infants), 409.

1 Will. IV., c. 22 (Evidence *de bene esse*), 606.

c. 40 (Undisposed-of residue), 132.

c. 46 (Illusory appointments), 481.

1 &amp; 2 Will. IV., c. 58 (Interpleader), 594.

3 &amp; 4 Will. IV., c. 27 (Limitations), 22, 303, 320.

c. 74 (Fines and Recoveries), 207, 229, 385.

c. 104 (Debts), 264-266, 279, 285, 292, 316.

c. 105 (Dower), 191.

c. 106 (Descents), 280.

5 &amp; 6 Will. IV., c. 65 (Copyright), 577.

7 &amp; 8 Will. IV. &amp; 1 Vict., c. 28 (Limitations), 304.

c. 28 (Foreclosure), 320.

1 Vict., c. 26 (Wills Act), 171, 191, 223, 406.

1 &amp; 2 Vict., c. 110 (Judgments), 314.

2 &amp; 3 Vict., c. 11 (Judgments), 263.

5 &amp; 6 Vict., c. 69 (Perpetuation of Testimony), 604.

8 &amp; 9 Vict., c. 76 (Legacy Duty), 176.

c. 106 (Real Property), 385.

13 &amp; 14 Vict., c. 60 (Trustee Act, 1850), 586.

14 &amp; 15 Vict., c. 83 (Lords Justices), 414.

c. 99 (Evidence), 15, 599.

## STATUTES—(continued.)

- 15 & 16 Vict., c. 76 (Common Law Procedure, 1852),—  
     s. 3 (Forms of Action), 9.  
     s. 55 (Profert), 422.  
     ss. 210, 212 (Forfeiture of lease), 342.  
     ss. 219, 220 (Ejectment of mortgagor), 304.  
   c. 86 (Chancery Jurisdiction Act, 1852),—  
     s. 3 (Indorsement in lieu of subpoena), 12.  
     s. 48 (Sale of mortgaged estates), 320.
- 16 & 17 Vict., c. 70 (Lunacy), 414-416.
- 17 & 18 Vict., c. 36 (Bills of Sale Act, 1854), 87-89.  
     c. 113 (Locke King's Act), 273, 276, 279.  
     c. 125 (Common Law Procedure Act, 1854), 15, 489, 509,  
         560, 583.  
         ss. 51, 52 (Discovery), 599.  
         s. 78 (Specific delivery), 31, 528-529.  
         s. 79 (Injunction), 551.  
         s. 83 (Equitable Pleas), 560.  
         s. 87 (Lost Bills of Exchange), 425.
- 18 & 19 Vict., c. 15 (Judgments), 263.  
     c. 43 (Infants' Settlements), 409.  
     c. 63, s. 23 (Debts), 263.
- 19 & 20 Vict., c. 97, s. 5 (Sureties), 487, 488.  
     c. 119 (Marriage), 409.
- 20 & 21 Vict., c. 57 (Malins's Act), 387, 388.
- 20 & 21 Vict., c. 77 (Court of Probate), 177, 617.  
     c. 85, s. 21 (Protection order), 347.  
         s. 25 (Judicial separation), 347.
- 21 & 22 Vict., c. 27 (Cairns's Act), 580.  
     c. 108, s. 8 (Protection order), 347.
- 22 & 23 Vict., c. 35 (Lord St. Leonards' Act), 159.  
     s. 4 (Fire Insurance), 343.  
     ss. 14-16, 18 (Devise subject to a charge), 113, 114.  
     s. 23 (Trustee's receipts), 114.  
     s. 31 (Trustee's indemnity), 159.  
     s. 32 (Investments), 162.
- 23 & 24 Vict., c. 38 ss. 3-5 (Judgments), 263.  
     s. 12 (Investments), 162.  
     c. 83 (Infants' Settlements), 407.  
     c. 126 (Common Law Procedure, 1860), 343, 594.  
         ss. 2, 3 (Fire Insurance), 343.  
     c. 127, s. 28 (Solicitor's lien), 335.  
     c. 145 (Lord Cranworth's Act), 306.  
         ss. 11, 13 (Mortgagee's powers), 306, 320-321.  
         s. 25 (Investments), 162.  
         s. 29 (Trustee's receipts), 114.
- 25 & 26 Vict., c. 42 (Rolt's Act), 583, 617, 619.
- 27 & 28 Vict., c. 112 (Judgments), 263, 314.
- 29 & 30 Vict., c. 96 (Bills of Sale Act, 1863), 88, 89.
- 30 & 31 Vict., c. 48 (Puffer at auction), 479.  
     c. 69 (Real Estate charges), 279.  
         s. 2 (Vendor's lien), 276.  
     c. 132 (Investments), 162.  
     c. 144 (Assignment of Life Policies), 95.
- 31 & 32 Vict., c. 40 (Partition), 583.

STATUTES—(*continued.*)

- 31 & 32 Vict., c. 86 (Assignment of Marine Policies), 96.  
 32 & 33 Vict., c. 4 (Purchase of Reversion), 476.  
     c. 46 (Specialty debts), 262, 286.  
     c. 71 (Bankruptcy, 1869), 89, 270, 359, 398, 429, 515.  
 33 & 34 Vict., c. 14 (Naturalisation), 146.  
     c. 28 (Solicitor's Remuneration), 472.  
     c. 93 (Married Women's Property), 128, 348, 366, 389,  
         410, 463.  
         s. 13 (Maintenance of husband), 370.  
         s. 14 (Of children), 370.  
 34 & 35 Vict., c. 27 (Investment), 163.  
 36 Vict., c. 12 (Infants' Custody), 404.  
 36 & 37 Vict., c. 66 (Judicature Act, 1873), 12-16, 265, 269, 414, 429,  
     506, 509, 513, 521, 551, 580, 594, 606, 610, 615, 621, 624.  
     s. 24, § 1 (Injunction), 569.  
     s. 24, § 5 (Injunction), 552.  
     s. 25, § 1 (Administration), 286.  
         § 2 (Breach of trust), 166, 266.  
         § 3 (Waste), 568.  
         § 5 (Mortgagor's rights), 18, 304.  
         § 6 (Assignment of chose in action), 77, 96,  
             99, 100.  
         § 8 (Injunction), 552.  
 37 & 38 Vict., c. 37 (Powers Amendment Act, 1874), 481.  
 37 & 38 Vict., c. 50 (Married Women's Property Amendment), 345,  
     365, 369, 389.  
     c. 57 (Real Property Limitation), 22, 266, 304, 320.  
     c. 78 (Vendor and Purchaser), 164-5, 314, 316.  
 38 & 39 Vict., v. 77 (Supreme Judicature Amendment Act, 1875), 12,  
     and *passim*.  
     c. 87 (Land Transfer Act, 1875), 165, 316.  
     c. 91 (Trade Mark Registration), 578.  
 39 & 40 Vict., c. 17 (Partition Act, 1876), 588.  
     c. 33 (Trade Mark Registration), 278.  
     c. 59 (Appellate Jurisdiction), 12, 13.  
 40 & 41 Vict., c. 18 (Settled Estates), 365.  
     c. 34 (Locke King's Further Amendment Act), 276.  
 41 & 42 Vict., c. 31 (Bills of Sale Act, 1878), 87-89.

## STATUTE OF FRAUDS—

- Trusts, how created before that statute, 57.  
 Trusts, how created since that statute, 57, 58.  
 Trusts, what excepted out of statute, 58.  
 Applies to freehold, copyhold, and leasehold lands, 58.  
 Applies not to pure personal estate, 58.

## STATUTES OF LIMITATION.—See LIMITATION, STATUTES OF.

## STATUTE OF USES—

- Uses before the statute, express and implied, 49-52.  
 Uses since the statute, express and implied, 52-54.  
 Failure of, in accomplishing its object, 54.  
 Failure of, causes of, 54, 55.  
 Failure of, restoration of equitable use (*i.e.*, trust) from, 55.  
 Applies to freehold lands, and only to passive uses therein, 56, 57.  
 Applies not to freehold lands, active uses therein, 56, 57.

STATUTE OF USES—(*continued.*)

Applies not to leasehold lands, 56.

Applies not to copyhold lands, 56.

Applies not to pure personal estate, 56.

## SURCHARGING AND FALSIFYING.—See ACCOUNT; TRUSTEES.

## SURETYSHIP—

Utmost good faith required between all parties, 482.

What concealment of facts by creditor releases surety, 482-3.

Fact must have been one which creditor was under obligation to disclose, 483-4.

Rule as to concealment in insurance inapplicable to common suretyships, 484.

Concealment of material fact part of the immediate transaction, 477, 484-5.

Surety ought to be informed of private bargain between vendor and vendee, varying his responsibility, 485.

Creditor must inquire as to circumstances of suretyship, if there is ground to suspect fraud on surety, 485.

Rights of creditor against surety regulated by instrument of guaranty, 486.

Surety cannot compel creditor to proceed against debtor, 486.

Remedies available for surety,—

(1.) Bill *quia timet* to compel payment by debtor, 486.

(2.) Judicial declaration of discharge, 486-7.

(3.) Action for reimbursement by debtor, 487.

(4.) Action for delivery up of securities by creditor, 487-8.

Extension of this right, 488.

(5.) Action against co-surety for contribution, 488.

At law, contribution was founded on contract, *secus*, in equity, 488.

Different effects of insolvency of one surety at law and in equity formerly, 488-489.

Contribution against representatives of a deceased surety, 488-489.

Parol evidence to show that apparent principal was surety, now allowed at law, 489.

Surety may limit his liability by express contract, 490.

Surety can only charge debtor for what he actually paid, 490.

Circumstances discharging the surety or co-surety,—

(1.) If creditor varies contract with debtor, without surety's privity, 490.

(2.) If creditor gives time to debtor, without consent of surety, and thereby affects the remedy of the surety, 491.

*Secus*, if remedy of surety not thereby affected, 491.

Also, *secus*, if creditor reserves his rights against surety, 491.

(3.) If creditor releases debtor, 491.

(3a.) If creditor releases one co-surety, 491.

*Secus*, if creditor merely covenants not to sue the debtor or co-surety, 491.

No reservation of rights possible in case of such actual release, 492-3.

(4.) If creditor loses securities or allows same to get back into debtor's hands, 493.

Marshalling of securities as against sureties, 493-4.

## SURPRISE.—See MISTAKE; FRAUD IN EQUITY.



SURVIVORSHIP.—See JOINT-TENANCIES.

SURVIVORSHIP, WIFE'S RIGHT OF.—See EQUITY TO A SETTLEMENT.

TACKING—

Principles of, 311.

Origin of, 311-12.

Rules of, 312-317.

(1.) Third mortgagee without notice buying in first mortgage, may tack, 312-313.

But must have taken his third mortgage without notice of second, 313.

Legal estate must be outstanding in hands of person having no privity with prior encumbrancers, 313.

(2.) Judgment creditor cannot tack, for he did not lend his money on security of the land, 313-4.

Rights of judgment creditors since 27 & 28 Vict., c. 112, 311, 314.

(3.) First mortgagee lending further sum on a judgment may tack against mesne incumbrancer, 314-5.

If he have legal estate or best right to call for it, and have made the further advance without notice, 315.

(4.) Where legal estate is outstanding, no right of, 315.  
Incumbrancers rank according to time, unless one have better right to call for legal estate, 315-16.

When a bond debt or simple contract debt may be tacked, 316.

Tacking abolished by Vendor and Purchaser Act, 1874, and restored by Land Transfer Act (1875), 316.

Applicable more readily to pledges and to mortgages of personalty, 331.

Judgment and simple contract debts, tacking of, 331-2.

See also CONSOLIDATION OF MORTGAGES.

TENANCY IN COMMON—

Where money is advanced by persons who take a mortgage jointly, there will be a, in equity, 134.

TESTAMENTARY GIFT—

If imperfect, not supported as a good *donatio mortis causa*, 171-2.

TESTATOR.—See WILLS.

TESTIMONY, BILL TO PERPETUATE—

To preserve evidence in danger of being lost before a question can be litigated, 603.

Depositions are not published until after death of witness, 603.

Equity refuses, if matter can be at once litigated, 603-4.

Or if evidence refers to a right which may be barred, 604.

What interest will entitle a plaintiff to file a, 604.

Before 5 & 6 Vict., c. 69, a mere expectancy insufficient, 604-5.

There must also have been some right to property, 605.

Bill to take testimony *de bene esse*, how distinguished from, 605.

Grounds for taking evidence *de bene esse*, 606.

Common law courts have now jurisdiction, 606.

Judicature Acts as bearing upon, 606.

TIME, A BAR.—See LIMITATIONS, STATUTE OF.

## TITLE-DEEDS—

- Inquiry for, must be made, to evade effect of notice, 40.
- Not ordered to be delivered up, when, 30-33.
- Remedy, in case of lost, 424-5.

## TRADE-MARKS.—See INJUNCTION.

## TRUST—

- Origin of, in grants to uses, 49.
- Uses arose temp. Edw. III., 49, 50.
- Chancellor's jurisdiction over conscience enabled uses to be recognised in Chancery, 50-52.
- Uses not recognised at common law, 50-52.
- Until Statute of Uses 27 Henry VIII., c. 10, made uses legal estates, 52, 53.
- Resulting use, consideration required to rebut, 53, 54.
- No use upon a use at law, 54.
- Hence equitable jurisdiction, 55.
- Trust distinguished from use for convenience only, 55.
- In equitable estates, equity follows analogy of the law, 55, 56.
- Property to which Statute of Uses is inapplicable, 56, 57.
- Trusts might be created by parol until the Statute of Frauds, 57.
- Statute of Frauds required writing to creation of certain trusts, 57, 58.
- Exceptions from statute, 58.
- Property to which the statute is applicable, 58.
- Definition of, 58, 59.
- Classification of trusts,—
  - (1.) Express, 60-123.
  - (2.) Implied, 124-135.
  - (3.) Constructive, 136-145.

## TRUSTEES—

- Who may be, 146.
- Equity never wants, 146, 147.
- In what sense servants, and in what sense controllers, of *cestui que trust*, 147.
- May be compelled to perform any act of duty, 147, 148.
- Or restrained from abuse of his legal title, 148.
- Cannot renounce after acceptance, 148.
- Cannot delegate his office, 148, 149.
- Unless there is a moral necessity for it, 149.
- Care and diligence required of, as regards—
  - (a.) Duties, 150.
  - (b.) Discretions, 150, 151.
- No remuneration allowed to, 151.
- Solicitor allowed only costs out of pocket, 151.
- May stipulate to receive compensation, 152.
- Must not make any advantage out of his trust, 152.
- Not enjoy the shooting, 152.
- Not charge more than he gave for purchase of debts, 152.
- Trading with trust estate, must account for profits, 152, 153.
- Cannot renew lease in own name, or purchase trust estate, 153.
- Same principles apply to agents and persons in a fiduciary capacity, 153.
- Exceptional cases in which fiduciary purchases hold good, 153, 154.
- Constructive, not liable to same extent as express, trustee, 154.

## TRUSTEES—(continued.)

- Remarks of Lord Westbury in *Knox v. Gye*, 154.
- Time runs in favour of constructive, 154, 155.
- Constructive, may charge for time and trouble, 155.
- Trustee liable for his co-trustee practically, 155, 156.
- Not liable for merely joining *pro forma* in receipts, 156.
- Onus* on, to prove that he did not actually receive, 156.
- Joining in a receipt must not permit the money to lie in the hands of his co-trustee, 156.
- Executor not liable for his co-executor practically, 157, 158.
- Difference between co-trustees and co-executors, 158.
- Executor joining in receipt *prima facie* liable, 158.
- True rule as to receipts by executors, 158, 159.
- Indemnity clauses, utility of,—
  - In general, 159.
  - In particular instances, 159–160.
- Duties of trustees,—
  - (1.) Must get in property, 161.
  - (2.) Must secure outstanding property, 161.
  - (3.) Must invest in authorised securities, 161, 162.
    - Range of investments authorised, 162, 163.
  - (4.) Conversion of terminable and reversionary property, 163.
    - Limit of liability of trustee for non-investment, 163, 164.
- Remedies of *cestui que trust*, in event of breach of trust,—
  - (1.) Right to follow trust estate, 164.
- Breach of trust creates simple contract debt, 165, 166.
  - (2.) Right of following the property into which the trust-fund has been converted, 166.
- When money, notes, &c., may be followed, 166, 167.
- Interest payable on breach of trust, 167.
- Cases in which more than four per cent. charged, 167, 168.
- Acquiescence, effect of, 168.
- Release and confirmation of trustees' acts, 168.
- Settlement of accounts, 168, 169.
- Surcharging and falsifying, 169.
  - See also TRUST; TRUSTS, CREATION OF; IMPLIED AND RESULTING TRUSTS, &c.

## TRUSTS, CREATION OF—

- Three requisites to, 103.
  - (1.) Certainty of words, 103–104.
  - (2.) Certainty of subject-matter, 103–104.
  - (3.) Certainty of objects, *i.e.*, beneficiaries, 103–104.
- Effect of want of any one of these three certainties, 104–107.
- Effect of want of any one of these, illustration of, 104–107.
- Leaning against construing precatory words as certain, 107.
- Who entitled to benefit, where intended trust fails, 107, 109.

## TRUSTS IN FAVOUR OF CREDITORS—

- Revocable as a general rule, 91.
  - Amounting to mere direction to trustees as to the mode of disposition, 91.
  - And being an arrangement for debtor's own convenience, 92.
- Irrevocable after communication to creditors, if creditor's position is altered thereafter, 92, 94.

TRUSTS IN FAVOUR OF CREDITORS—(*continued.*)

Irrevocable where creditor a party to deed, 94.

Who not entitled to benefit of, 94.

## TRUSTS IN THE GARB OF POWERS.—See POWERS IN THE NATURE OF TRUSTS.

## UNCONSCIONABLE BARGAINS—

With common sailors, 475.

Of heirs and reversioners, 476.

Doctrines of the court not affected by 32 & 33 Vict., c. 4, 476.

Knowledge of persons standing *in loco parentis* does not *per se* make such transactions valid, 476-7.

*Post-obit* bonds, relief in case of, 477.

Tradesmen selling goods at extravagant prices to infants, 477.

Party may bind himself by subsequent acquiescence, 477.

## UNDUE INFLUENCE—

Free and full consent are necessary to validity of a contract, 458-459.

See FRAUD IN EQUITY.

## UN SOUND MIND, PERSONS OF.—See LUNATICS.

## USES.—See TRUST.

## VADIUM.—See MORTGAGE.

## VENDOR'S LIEN.—See LIEN.

## VIGILANTIBUS NON DORMIENTIBUS ÆQUITAS SUBVENIT—

Illustrations of the maxim, 43, 45.

## VIVUM VADIUM.—See MORTGAGE.

## VOLUNTARY SETTLEMENTS.

Notice of, does not affect subsequent purchaser, 83, 84.

Under 13 Eliz., c. 5, must be both on good consideration and *bond fide*, 81.

Not necessarily fraudulent under 13 Eliz., c. 5, 81.

Settlor indebted at the time of, not necessarily an avoidance of, 81.

What amount of indebtedness will raise presumption of fraudulent intent, 81-83.

Under 27 Eliz., c. 4, voluntary settlement void as against subsequent purchaser, 83, 84.

Chattels personal are not within the statute 27 Eliz., c. 4, 84.

A mortgagee is, a judgment creditor is not, a purchaser within the statute, 84.

*Bond fide* purchaser under 27 Eliz., c. 4, who is, 84.

Marriage a valuable consideration under 27 Eliz., c. 4, when and when not, 85-87.

Post-nuptial settlement in pursuance of ante-nuptial agreement, 85, 86.

Post-nuptial settlement supported on slight consideration, 86.

Post-nuptial settlement under Bills of Sale Act (1878), 87-89.

Trader's post-nuptial settlement under Bankruptcy Act (1869), 89, 90.

How far limitations to remote objects in marriage settlements are voluntary, 90.

Trust in favour of creditors, when and when not revocable, 90-94.

**VOLUNTARY TRUSTS—**

- Distinguished from trusts for value, 68, 69.
- General rules regarding validity of, 68, 69.
- Has relation of *cestui que trust* been constituted, 69, 70.
  - (1.) Where donor is both legal and equitable owner.
    - (a.) Trusts actually created—
      - Either (1.) By conveyance on trust, 70.
      - Or (2.) By declaration of trust, 70.
    - (b.) Trusts not actually created,—
      - Either (1.) No declaration of trust, 70, 71.
      - Or (2.) Incomplete conveyance of trust, 70, 71.
    - Examples of trusts actually created, 70-75.
    - Examples of trusts not actually created, 70-75.
    - Effect of trust not actually created, 70-75.
  - (2.) Where donor is only equitable owner,
    - (a.) Trusts actually created, as above, 75.
    - (b.) Trusts not actually created, as above, 75.
    - Examples of both, as above, 76-80.
    - Effect of trust not actually created, 76-80.

**VOLUNTARY TRUSTS AND TRUSTS FOR VALUE, 68-80.**

- Distinguished in themselves, 68, 69.
- Distinguished in their effects, 69.

**WAIVER OF LIEN.—See LIEN.**

**WARD OF COURT.—See INFANT.**

**WASTE—**

- Injunction in cases of, arose from inadequacy of common law remedy, 566.
- In what cases equity interferes, 566-7.
- Equitable waste, 567.
- When a person is punishable at law and abuses his legal right, 567.
- In case of tenant in tail after possibility of issue extinct, 567-8.
- Where plaintiff has purely an equitable title, 568.
- Cases of mortgagor and mortgagee, 568.
- Permissive, not remediable, 568.
- Judicature Acts, effect of, regarding, 568-9.

**WELSH MORTGAGE.—See MORTGAGE.**

**WEST INDIA ESTATES—**

- Mortgagees of, their rights, 306-7.

**WHO SEEKS MUST DO EQUITY.—See HE WHO SEEKS EQUITY, &c.**

**WIFE.—See MARRIED WOMAN; ADVANCEMENT; ELECTION; SEPARATE ESTATE; EQUITY TO SETTLEMENT; FRAUD ON MARITAL RIGHTS; PIN-MONEY; PARAPHERNALIA, &c.**

**WILLS—**

- Executory trusts in. See EXECUTED AND EXECUTORY TRUSTS.
- Trusts, creation of, in. See TRUSTS, CREATION OF; PRECATORY WORDS.
- Trusts in, for payment of debts and legacies. See CHARGE OF DEBTS.
- Admission of parol evidence in construction of. See PAROL EVIDENCE; EXTRINSIC EVIDENCE.

WILLS—(*continued.*)

Conversion under. See CONVERSION.

When inconsistent or alternative bequests in. See ELECTION.

When cumulative or substitutionary bequests in. See SATISFACTION ;  
LEGACIES.

Rewards for influencing testator in making a will fraudulent, 465-6.

See FRAUD IN EQUITY.

Mistakes in, when and what corrected in equity, 443-5.

Bill to establish, 617.

WRIT NE EXEAT REGNO. See NE EXEAT REGNO, WRIT OF.

## WRITS—

Procedure at common law by, cramped and inflexible, 8-10.

*In consimili casu*, statute giving, and failure thereof, 10, 11.

## WRONG—

Equity will not suffer, without remedy, 18, 19.

## II.—INDEX TO THE PRACTICE.

---

### ABATEMENT—

- (1.) Of action,—  
None, upon devolution of interest, 656-7. See REVIVOR.
- (2.) Pleading in,—  
Abolished, 660.

### ACCOUNT, JUDGMENT FOR—

- Immediately after time for appearance to writ, 695, 704-5.
- Upon summons, 704-5.
- At any other stage of action, 704-5.
- Upon motion, 704-5.
- Upon motion for judgment, 702.
- Reserves further consideration, 695.
- See INQUIRIES, JUDGMENT FOR.

### ADMISSIONS—

- (1.) Of allegations in pleadings, either,—
  - (a.) From express admission, 679; or,
  - (b.) From absence of any specific denial or express non-admission, 679; or,
  - (c.) From default of pleading, whether by original party or by third party added, 679.
  - (d.) From non-compliance with order to answer interrogatories, or order for discovery and inspection of documents, 679-680.
- (2.) Of documents,—  
Upon notice to admit, 679.
- See DOCUMENTS.

### ADMISSIONS IN EVIDENCE—

Judgment on, 699.

### ADMISSIONS IN PLEADINGS—

- Judgment on, 698.
- Cases for judgment, 698.
- As soon as right to judgment appears, 698.
- On simple motion, 695.
- See ADMISSIONS; JUDGMENT, VARIOUS GROUNDS FOR; PLEADINGS.

### AFFIDAVIT, EVIDENCE BY—

- (1.) Upon interlocutory applications, 680; either,—
  - (a.) Voluntary affidavit, 680; or,
  - (b.) Deposition (voluntary or involuntary), 680-681.
- (2.) At trial, 680-681.
- Depositions, how made available at trial, 680-1.

AFFIDAVIT, EVIDENCE BY—(*continued.*)

- Proof of particular facts by affidavit, 680-1.
- Entire evidence, by written consent of parties, 681.
  - (a.) Plaintiff's affidavits, 681.
  - (b.) Defendant's affidavits, 681.
  - (c.) Plaintiff's affidavits in reply, 681.
- When to be printed, and when written, 681-2.
- Cross-examination on affidavits, 682-3.
  - (a.) Upon interlocutory applications, 682.
    - How and where taken, 682.
  - (b.) Upon depositions, 682.
  - (c.) At trial, 682-3.
- Production of witnesses for cross-examination, 682-3.
  - How obtained, 682-3.
  - Costs of production, 682-3.
- Evidence in Court of Appeal, 759-60.
- Evidence in House of Lords, 757.
- See EVIDENCE.

## AFFIDAVIT OF DOCUMENTS.—See DISCOVERY.

## AMENDMENT—

- (1.) Of writ,—
  - With leave only, 637-8.
  - What amendments allowed, 637-8.
  - Occasions for amending pleadings generally, 669-670.
- (2.) Of statement of claim,—
  - When without leave, 670.
  - Only once, and within what time, 670.
  - When with leave, 671.
    - Original amendments, 671.
    - Consequential amendments, 671-2.
  - When involuntary, 671.
- (3.) Of statement of defence, without counter-claim,—
  - Only with leave, 670.
- (3a.) Of [statement of defence, with] counter-claim,—
  - When without leave, 670-671.
  - Only once, and within what time, 670-671.
  - When with leave, 671.
    - Original amendments, 671.
    - Consequential amendments, 671-2.
  - When involuntary, 671.
- Service of amended writ, and time for, 638.
- Delivery of amended pleading, and time for, 672.
- Marking of amendment, 672.
- Mode of incorporating amendments, 672.
- Of notice of appeal to Court of Appeal, 753.

## ANSWER TO INTERROGATORIES.—See DISCOVERY.

## APPEAL TO COURT OF APPEAL—

- Manner of appealing, 752.
- Notice of appeal, service of, 752.
- Cross-appeal notice, 753.
- Notice of appeal, amendment of, 753.
- Notice of appeal, length of, 753.



**APPEAL TO COURT OF APPEAL—***(continued.)*

Cross-appeal notice, length of, 753.

Time for, 753.

(1.) From judgment (final or interlocutory), 754.

(a.) Where refused, 754.

(b.) Where made, 754.

(2.) From interlocutory order, 753.

(a.) When refused, 753.

(aa.) *Ex parte*, 753.

(bb.) On notice, 753.

(b.) When made,

(aa.) *Ex parte*, 754.

(bb.) On notice, 754.

(3.) In winding up of companies, 754.

(4.) In bankruptcy, 754.

(5.) In proceedings other than actions, 754.

Setting down of, 754-5.

Judgment on appeal, 755.

Costs of appeal, 755.

Execution on appeal, 755-6.

See EVIDENCE.

**APPEAL TO DIVISIONAL COURT—**

From County Courts—

(1.) Upon special case, mode of and time for, 751-2.

(2.) By motion, mode of and time for, 752.

From other Inferior Courts, 628.

**APPEAL TO HOUSE OF LORDS—**

What judgments and orders appealable, 756.

Manner of appealing, 756.

Time for appealing, 756.

Security for costs of, 756.

"Form of appeal," 756-7.

Presentation of appeal, 757.

Appearance of respondents on, 757.

Printed cases and appendices, lodging of, 757.

Setting down, 757-8.

Cross appeals, 758.

Supplemental cases, 758.

Judgment on, 758.

Costs of, taxation and recovery of, 758.

Execution, 758-9.

See EVIDENCE.

**APPEALS, VARIETIES OF—**

From Inferior Courts, 628, 751.

From County Courts, 628, 751-2.

From Lord Mayor's Court, 751.

From Chambers, 751.

From District Registries, 729.

From High Court, 750.

From Divisional Court, 750-751.

From Court of Appeal, 750.

## APPEALS, WHEN, AND WHEN NOT, ALLOWED—

None where, in interpleader, question is summarily disposed of, 645.

None, from order made by consent, 750.

Unless by leave of the ordering judge, 750.

None, from order as to costs, 750.

Unless by leave of the ordering judge, 750.

None, from Divisional Court (sitting as Court for Crown Cases Reserved), 750-1.

None, from Divisional Court (sitting as Appeal Court, from Inferior Courts), 751.

What judgments and orders appealable, 750.

To Court of Appeal, 750-1.

To House of Lords, 750.

To Divisional Courts, 751-2.

## APPEARANCE AT TRIAL—

Default of. See DEFAULT OF APPEARANCE AT TRIAL.

## APPEARANCE TO COUNTER-CLAIM—

Of party-defendants to counter-claim not already parties to action, 654.

## APPEARANCE TO NOTICE OF CLAIM—

Where remedy (in case of primary liability established) is claimed against third person, by persons not already parties, 655.

## APPEARANCE TO NOTICE OF QUESTION—

Where question to be determined in the action is to be binding upon third person, by persons not already parties, 656.

## APPEARANCE TO WRIT OF SUMMONS—

Mode of, and place for, entering, 640-641.

Time for entering, 641.

Entering, after regular time for, expired, 641.

Of particular defendants, 641.

Partnerships, 641.

Added or substituted defendants, 652-6.

Leave for, and entry of, in particular cases, 641-2.

Landlords (in ejectment), 641-2.

Where writ under Bills of Exchange Act (1855), 642. See EXCHANGE, BILLS OF.

Memorandum of, contents of, 642-3.

In the general case, 642.

In case of landlords (in ejectment), 643.

Plaintiff's motion to set aside, 643.

Plaintiff's affidavit of service in lieu of, 643.

Of infant defendant, 643-4.

In the general case, 643.

Appointment of guardian *ad litem*, 643-4.

Of lunatic defendant, 643-4.

In the general case, 643.

Appointment of guardian *ad litem*, 643-4.

Summons after, to interplead, and proceedings thereon, 644-5. See INTERPLEADER.

Consolidation-order after, 646-7. See CONSOLIDATION OF ACTIONS.

Order for transfer of action, after, 648-9. See TRANSFER OF ACTIONS.

## APPELLATE COURTS, VARIETIES OF—

- House of Lords, 750.
- Court of Appeal, 750.
- Divisional Court, 628, 750-1.
- Sitting for Crown Cases Reserved, 750-751.
- Sitting for Appeals from Inferior Courts, 751.

## APPENDICES, PRINTED—

- Lodging of, in House of Lords Appeals, 757.

## ASSISTANCE, WRIT OF—

- When it issues, 718.
- Is optional substitute for writ of attachment, 718.
- Manner of execution, 718.
- Issues with leave only, 718.
- How leave to issue obtained, 718.

## ASSISTANT WRITS—

- Varieties of, 706.
- Venditioni Exponas*, 717-8.
- Distringas nuper vicecomitem*, 718.
- Fi. fa. de bonis ecclesiasticis*, 718.
- Sequestrari facias de bonis ecclesiasticis*, 718.
- Assistance, 718.
- See EXECUTION.

## ATTACHMENT, WRIT OF—

- Issues with leave only, 714.
- Leave obtained on motion with notice, 714.
- Upon what judgments it issues, 714-5.
- Force of, 715.
- Is not penal, 715.
- Against particular persons, 715-6.
- Solicitor not entering appearance, 715.
- Solicitor not bringing order for discovery to knowledge of client, 751.
- Party disobeying order for discovery, 715-6.
- Referee may not issue, 716.
- Master may not issue, 716.
- District Registrar may not issue, 716.

## AUDITÂ QUERELÂ, WRIT OF—

- Order to stay execution, in lieu of, 724.

## CAPIAS, WRIT OF—

- Cases in which it is available, 717.
- Issues by leave only, 717.

## CA. SA., WRIT OF—

- May still issue in a proper case, 717.

## CHAMBERS—

- Mode of application at, 724.
- Reference from chief clerk to judge in, 724.
- No appeal from chief clerk to judge in, 724.
- Appeal from master to judge in, 724-5.
- Appeal from chief clerk (or judge) in Chambers to judge in court, 725.
- Appeal from common law judge at Chambers to Divisional Court, 725.

CHAMBERS—(*continued*.)

- Appeal direct (with leave) from chief clerk (or judge) in Chambers to Court of Appeal, 725.
- References to, by judge in court, 725.
- Adjournment from, by judge in Chambers to judge in court, 725.
- Proceedings in, 725-726.

## CHAMBERS, PROCEEDINGS IN—

- Generally what matters, 726-7.
- In particular what matters, 727.
- Distinction between Common Law and Chancery as to proceedings in Chambers, 727-8.
- What proceedings not taken before master, 728.
- What proceedings before master, by consent, 728.
- Matters optional for court or for Chambers, 728-9.
- See SUMMONS, PROCEEDINGS BY.

## CHANCERY DIVISION—

- General jurisdiction of, 626-7.
- (a.) What jurisdiction is *exclusive*, 626-7.
- (b.) What jurisdiction is *concurrent*, 627.
- Enumeration of courts, 626.
- Appeals from Chambers in, 751.
- Appeals from District Registries, 729.
- Appeals to Court of Appeal, 750.
- Appeals to House of Lords, 750.
- Chambers, proceedings in, 724-6.
- District Registries, proceedings in, 729-33.
- Motions and summonses, proceedings by, 735-742.

## CHARGING ORDER—

- On stock and shares, 719.
- Whence it issues, 719.
- Manner of obtaining, 719.
- Affidavit on application for, contents of, 719-720.
- Is *nisi* in first instance, 720.
- Cannot be made absolute, if debtor dead at date of order *nisi*, 720.
- See DISTINGAS, WRIT OF; EXECUTION.

## CHIEF CLERK AND MASTER—

- Distinguished, 724-5, 726, 727-8.

## CLOSE OF PLEADINGS.—See PLEADINGS.

## COMMON LAW DIVISIONS—

- Enumeration of courts, 625.
- Jurisdiction, what *concurrent*, 627-8.
- Jurisdiction, what *exclusive*, 627-8.
- Proceedings in Chambers before master, 726-8.

## CONFESSION OF DEFENCE—

- When defence arisen since action commenced, 669.
- Judgment for costs upon, 669.

## CONSOLIDATION OF ACTIONS—

- Where divers defendants, and same plaintiff or plaintiffs, the question being substantially the same, 646.

CONSOLIDATION OF ACTIONS—(*continued.*)

- Order for, by whom, and how, obtained, 646.
- Undertaking of defendant or defendants obtaining the order, 646.
- Order for, in what sense binding (and in what sense not binding) on plaintiff, 646-7.
- Order for, as against non-appearing defendants, 647.
- Order for, as against appearing defendants not applying for it, 647.
- Where divers plaintiffs, and same defendant or defendants, converse-order to consolidation-order, 647.

## COSTS—

- When no costs given to successful party, 744, 746.
- Where solicitor of party is uncertificated, 744.
- Of three counsel, when allowed, 744.
- Of shorthand notes, when and how allowed, 744.
- Of abandoned motion, 744.
- Of motion to commit for contempt, 745.
- Of refreshers, 745.
- Of experts, 745.
- No provision as to, on change of solicitors, 745.
- Bringing action to trial, only for, 745.
- Staying payment of, 745.
- On claim and counter-claim, 743, 745.
- Signing judgment for, 745.
- Solicitors' retainer for, whether joint or several, 745.
- When costs added to security, 746-7.
- When costs out of estate, 747.
- Where action might have been in county court, 747.
- When action removed into county court, 747-8.
- For prolixity in pleading, 748.
- Extra, occasioned by misjoinder or non-joinder of parties, 748.
- Extra, occasioned by improper joinder of actions, 748.
- For unnecessary statement of claim, 748.
- For foolishly hostile defence, 748.
- For frivolous demurrer, 748.
- Of unseasonable amendments, 748.
- Of demurrer, when allowed, 748.
- Of demurrer, when overruled, 748.
- On dismissal of action for want of prosecution, 748.
- Of improper interrogatories, 748.
- Of improper refusal to admit documents, 748.
- Of monstrous affidavits, 748-9.
- On setting aside judgment of non-suit, 749.
- Of attachment of person, 749.
- Of attachment of debts, 749.
- On appeals, 749, 755, 758.
- Taxation of, 749-750, 758.
- See COSTS, TAXATION OF.

## COSTS, EXECUTION FOR—

- When it may issue, 722-3.
- When and from what date interest included, 708.
- Of appeal to Court of Appeal, 755-6.
- Of appeal to House of Lords, 758-9.

**COSTS, JUDGMENT FOR—**

Upon discontinuance of action, 705.

Upon matter withdrawn, 705.

By successful defendant, 705.

**COSTS, PROVISIONS REGARDING—**

(1.) General provisions, 743.

Follow event, 743.

Subject to particular provisions, 743.

When costs payable out of a particular estate, 744.

Costs of trustees, mortgagees, &c., 744.

Of successful appeal, 744.

Security for costs, 745-6.

(2.) Particular provisions regarding, 746-9.

(a.) Independently of Judicature Acts, 746-7.

(b.) Under particular statutes not affected, or else adopted, by Judicature Acts, 747-8.

(c.) Under Judicature Acts, 748-9.

And see **COSTS**; **EXECUTION**; **COSTS, EXECUTION FOR**; **COSTS, JUDGMENT FOR**.

**COSTS, SECURITY FOR.—See SECURITY FOR COSTS.****COSTS, TAXATION OF—**

Special allowances, provisions for, 749-750.

On higher or on lower scale, 750.

May be even after payment, 750.

Of appeal to Court of Appeal, 755-6.

Of appeal to House of Lords, 758.

See **FEES AND PERCENTAGES**.

**COUNTER-CLAIM—**

Is like statement of claim in cross-action, 659.

States facts specifically, 659-660.

States relief claimed specifically, 659.

May also claim general relief, 659.

Must be so described in statement of defence, 660.

Should not state facts by reference merely, 666.

Application to exclude, 666-7.

Service of, 654.

**COUNTERMAND OF NOTICE OF TRIAL.—See NOTICE OF TRIAL.****COUNTY COURTS—**

General jurisdiction of, 629-630.

Appeals from, are to Divisional Court, 630.

Mode of appeal,

(1.) By special case, 751-2.

(2.) By motion, 752.

See **APPEALS, VARIETIES OF**; **COSTS, PROVISIONS REGARDING**.

**COURT, LORD MAYOR'S—**

Appeal from, to Divisional Court, 751.

**COURTS—**

I. High Court, 625.

Branches of, in Chancery, 625.

Branches of, at Common Law, 625.

COURTS—(*continued*).

## II. Court of Appeal, 625.

Constitution of, where appeal is from judgment, 625.

Constitution of, where appeal is from interlocutory order,  
625-6.

## III. House of Lords, 626.

See COUNTY COURTS.

## COURTS, COUNTY.—See COUNTY COURTS.

## COURTS, DIVISIONAL—

Matters to be heard by, 628-9.

Appeals from, are to Court of Appeal, 629.

## COURTS, INFERIOR—

General jurisdiction of, 629-630.

Appeals from, are to Divisional Court, 630.

See INFERIOR COURTS.

## CROSS-EXAMINATION.—See WITNESSES, EXAMINATION OF; EVIDENCE VIVA VOCE; AFFIDAVIT, EVIDENCE BY.

## CROSS-PARTIES.—See PARTIES.

## DEFAULT OF APPEARANCE TO WRIT—

Judgment for, 695.

Recovery of land, 695.

Detention of goods, 696.

Pecuniary damages, 696.

Debt, 696.

Liquidated damages, 696.

## DEFAULT OF APPEARANCE AT TRIAL—

Judgment for, 698.

Default of defendant, 698.

Default of plaintiff, 698.

## DEFAULT OF PLEADING—

Judgment for, 696.

Default of plaintiff, 696.

Default of defendant, 696.

Default of third party, 696-7.

Default of one or more of several defendants, 697.

On simple motion, when, 697.

On motion for judgment, in other cases, 697.

## DEFENCE—

Time for delivery of, 658.

Modes of,—

(1.) By demurrer. See DEMURRER.

(2.) By plea. See PLEA.

(3.) By defence properly so called, 663-4.

Defence properly so called, 664-5.

Admits (or not) certain statements, 664.

Denies or non-admits other statements, 664.

Adds substantive statements, 664-5.

May be with or without counter-claim, 663, 666.

DEFENCE—(*continued.*)

Defending in divers manners in, 667.

When only with leave, 667.

Pleading after demurring, by leave only, 667.

See DEMURRER.

## DEFENCE AND COUNTER-CLAIM—

Where claim by defendant against plaintiff, with or without other persons, 666.

See also COUNTER-CLAIM.

## DEFENCES SINCE ACTION COMMENCED—

Mode of pleading, 668-9.

Time for, 668-9.

Plaintiff's confession of, 669.

## DELIVERY, WRIT OF—

Upon what judgments it issues, 714.

Mode of issuing, 714.

Enforcement of, 714.

## DEMURRER—

A mode of defence to statement of claim, 663-4.

It admits facts in statement of claim, 663.

It denies sufficiency in law of such facts, 663.

May be to entire statement of claim, 664.

May be to part only of statement of claim, 664.

Must state some substantial ground of law, 664.

To pleadings other than statement of claim, 664, *n.*

Along with other manner of defence, 667.

Pleading after demurrer overruled, 667.

Time for appealing judgment on, 771.

## DEPOSITIONS.—See AFFIDAVITS, EVIDENCE BY.

## DISCONTINUANCE—

Of action, by plaintiff, 669, 687.

Mode of, 687.

When without leave, 687.

When with leave only, 687.

Effect of, 687.

Costs upon, 687.

By consent, 687.

Written consent must be produced, 687.

See WITHDRAWAL.

## DISCOVERY—

(1.) Interrogatories, and answer thereto,—

(a.) Interrogatories by plaintiff to defendant, and defendant's answer thereto, 674.

Time for administering interrogatories, 674.

When interrogatories without leave, 674.

When interrogatories only with leave, 675.

Defendant's affidavit in answer,

Time for, 675.

Affidavit may object to answering, 675-6.

Grounds for objecting to answer, 675-6.



**DISCOVERY—***(continued.)*

- Summons or motion by plaintiff for default or insufficiency of defendant's answer, 675-6.
- Order to make affidavit or further affidavit in answer, 676.
- Effect of non-compliance with order, 676.
- When affidavit to be printed or merely written, 676.
- (b.) Interrogatories by defendant to plaintiff, and plaintiff's answer thereto, 674.
- Time for administering interrogatories, 674.
- When interrogatories without leave, 674.
- When interrogatories only with leave, 674-5.
- Plaintiff's affidavit in answer,
  - Time for, 675.
  - Affidavit may object to answering, 675.
- Grounds for objecting to answer, 675-6.
- Summons or motion by defendant for default or insufficiency of plaintiff's answer, 675-6.
- Order to make affidavit or further affidavit in answer, 676.
- Effect of non-compliance with order, 676.
- When affidavit to be printed or merely written, 676.
- Interrogatories should be reasonable, and not vexatious or improper, 675.
- Interrogatories being relevant are never vexatious, 675.
- Interrogatories, how administered to a corporate body, 675.
- (2.) Affidavit of documents, 676-7.
  - Order to make, obtainable by either plaintiff or defendant, 676-7.
  - Mode of obtaining order for, 676-7.
  - Form and contents of affidavit, 677.
- (3.) Notice to produce, and offer of inspection, 677-8.
  - As to documents mentioned in pleadings or in affidavits (including affidavit of documents), 677.
  - Offer to produce for inspection, time for, 677-8.
  - Time for, and place of, inspection, 677-8.
  - Notification of time and place may state any objections to inspection, 678.
- (3a.) Order to produce for inspection, 678.
  - Time for, and how obtained, 678.
  - In what cases the court will postpone making the order, 678.
  - Effect of non-compliance with order, 678.

**DISMISSAL OF ACTION—**

- For want of prosecution, 740.
- For plaintiff's default in delivering statement of claim, 740.
- For plaintiff's non-compliance with an order to make discovery, 740.
- For plaintiff's default in giving notice of trial, 740.
- For plaintiff's default to give security for costs, 740.

**DISTRICT REGISTRIES—**

- Mode of application in, 729.
- References from, to judge, 729.
- References to, by judge, 729.
- Production of books, &c., in, 729.
- Report of District Registrar, 729.

DISTRICT REGISTRIES—(*continued.*)

- Appeal from, to judge, and time for, 729.
- Proceedings in, 729-731.
- Removal from, into High Court, 731-2.
- Removal into, from High Court, 732-3.
- Jurisdiction of High Court over, 733.

## DISTRICT REGISTRIES, PROCEEDINGS IN—

- Writ of summons, issue of, 632, *n.*
- Appearance, entry of, 640-1, *n.*
- Subsequent proceedings, what and what not, 730-731.
- Judgments and orders, entry of, when and when not, 730-731.
- Taxation of costs, when and when not, 731.
- Execution, issue of, when and when not, 731.
- Generally what proceedings forbidden, 731.

## DISTRICT REGISTRAR—

- Jurisdiction of court over, 733.

## DISTRICT REGISTRIES, REMOVAL INTO.—See REMOVAL OF ACTION.

## DISTRICT REGISTRIES, REMOVAL FROM.—See REMOVAL OF ACTION.

## DISTRINGAS, WRIT OF—

- Whence it issues, 719.
- Who may issue it, 719.
- Manner of issuing, 719.
- Issues only against stock transferable at Bank of England, 719.
- Injunction in nature of, 719.
  - Against stock and shares generally, 719.
- See CHARGING ORDER; EXECUTION.

## DISTRINGAS NUPER VICECOMITEM—

- When it issues, 718.
- Is assistant to writ of *fi. fa.*, 718.
- Force of, 718.
- See EXECUTION.

## DIVISIONAL COURTS.—See COURTS DIVISIONAL.

## DOCUMENTS—

- Service of. See SERVICE OF DOCUMENTS.
- Pleading, effect of, 661.
- Admission of, 679.
- Costs for refusal to admit, 748.

## ELEGIT, WRIT OF—

- Upon what judgments, 713.
- Force of, 713.
- Writs in aid of, 713, 717-8.
- See EXECUTION.

## ENTRY FOR TRIAL.—See TRIAL, PRELIMINARIES TO.

**ENTRY OF JUDGMENTS—**

- Usually in London Office, 705, *n*.
- When in District Registry, 706, *n*.
- Date of judgments as entered, 705-6.

**ENTRY OF ORDERS—**

- Usually in London Office, 705, *n*.
- When in District Registry, 706, *n*.

**EQUITABLE TITLE.—See TITLE, EQUITABLE.****EVIDENCE—**

- Partly obtained by discovery. See **DISCOVERY**.
- Partly obtained by inspection of property. See **INSPECTION OF PROPERTY**.
- Partly superseded by admissions. See **ADMISSIONS**.
- When *vivâ voce*. See **EVIDENCE, VIVA VOCE**.
- When by affidavit. See **AFFIDAVIT, EVIDENCE BY**.
- Documents, &c., sealed with seal of District Registry, are thereby made evidence everywhere, 683.
- Admission of documents, proof of, by affidavit, 683.
- Writs of execution, renewals of, proved by renewal seal, 685.
- Sometimes taken by commission, 685.
- At trial, mode of taking,—
  - (1.) When *vivâ voce*, 689.
  - (2.) When by affidavit, 689.
- At trial, affidavits to prove particular facts only, 680-681.
- At trial, rebutting evidence by leave, 690-1.
- On appeals,—
  - On appeal from County Courts, none, 752.
  - On appeal to Court of Appeal, 759-760.
    - (a.) Evidence used in High Court, 759.
      - (aa.) By affidavit, 759.
      - (bb.) *Vivâ voce*, 759.
    - (b.) Further evidence, 759.
      - (aa.) Upon interlocutory appeals, 759.
      - (bb.) Upon judgments appealed, 759-760.
  - On appeal to House of Lords, 757.
  - On motions, 680-681, 736.
  - On summonses, 726.
  - At Chambers, 726.
  - In District Registry, 729.

**EVIDENCE, VIVA VOCE—**

- The usual mode of taking evidence in an action, 680.
- Examination-in-chief of own witness, 680.
- Cross-examination of other party's witnesses, 680.
- Re-examination of cross-examined witness, 680.
- Affidavits supplementary to, 680.

**EXAMINATION OF WITNESSES.—See WITNESSES, EXAMINATION OF.****EXCHANGE, BILLS OF—**

- Summary procedure on, 645-6.
- Purport of writ of summons under Act of 1856, 645-6.
- Leave to appear, when and how obtained, 642.
- Leave to appear, if not obtained, immediate judgment, 642.

**EXCHANGE, BILLS OF—***(continued.)*

Leave to appear, if obtained, formal procedure as in other actions,  
642.

See **SUMMONS, WRIT OF.**

**EXECUTION—**

Varieties of writs of, 706.

Varieties of assistant writs of, 706.

Judgments upon which it may issue, 707.

On orders equally with judgments, 707.

Mode of issuing, 707-8.

Office copy judgment or order, 707.

Præcipe, 707.

Date of, 708.

Indorsements upon writ of, 708.

In the general case, 708.

When for the recovery of land, 708.

Contents of writ of, 708.

Time for issuing, 709-710.

Amount to be levied, 710-711.

Order of issuing divers writs of, 721.

Leave to issue, 721-2.

Leave to renew writ of, 723.

Order to stay, 723-4.

On judgment of Court of Appeal, 755-6.

On judgment of House of Lords, 758.

[See also the **NAMES OF PARTICULAR WRITS.**]

**FEEs.—**See **FEEs AND PERCENTAGES.****FEEs AND PERCENTAGES—**

Orders of October 1875 (court fees, stamps), 749.

Order of April 1876 (fees and percentages), 749.

Order of April 1877 (fees of official referees), 749.

Order of October 1877 (fees in Manchester and Liverpool District  
Registries), 750.

See **COSTS.**

**FI. FA., WRIT OF—**

Upon what judgments, 711.

Force of, 711.

Writs in aid of, 711, 717-8.

See **EXECUTION.**

**FI. FA., WRIT OF, ON GARNISHEE ORDER—**

Issues by leave only, 711.

Issues without any previous writ, 711.

Limit to the amount of execution, 711.

Garnishee may forestall issue of writ, 711.

When writ will be stayed issuing, 711-2.

Proceedings before issuing, 712.

See also **GARNISHEE ORDER.**

**FI. FA., WRIT OF, DE BONIS ECCLESIASTICIS—**

When it issues, 718.

Is assistant to writ of *fi. fa.*, 718.

Manner of executing, 718.

**FINAL JUDGMENT—**

Various grounds of, and modes of obtaining, 695-704.

See JUDGMENT, VARIETIES OF ; JUDGMENT, VARIOUS GROUNDS FOR.

**FORM OF APPEAL—**

In appeal to House of Lords, what is, 756-7.

**FORMAL PROCEDURE—**

What is, and how distinguished from summary procedure, 630-631.

**FRAUD—**

Plea of, 661.

**FURTHER CONSIDERATION—**

May be reserved in giving judgment at trial, 700.

Trial may be adjourned for, 701.

May be reserved upon judgment without trial, 702.

New trial may be adjourned for, 703.

Report of referee remitted for, 703-4.

See JUDGMENT, VARIETIES OF.

**FURTHER DEFENCE—**

Occasion of, and time for, 668-9.

**FURTHER REPLY—**

Occasion of, and time for, 668-9.

**GARNISHEE ORDER—**

Manner of applying for, 720.

Is *nisi* in first instance, 720.

Force of, 720.

How made absolute, 721.

Where garnishee does not appear, 721.

Where garnishee appears, 721.

Effect of payment under, 721.

On what judgments no garnishee order issues, 721.

*Fi. fa.*, issue of, upon, 711.

See CHARGING ORDER ; EXECUTION.

**GUARDIAN AD LITEM—**

Appointment of, in cases of infants, 643-4.

Either,—

(1.) To appear to writ of summons, and (having appeared) to defend, 643-4.

Or,—

(2.) To defend, 643-4.

Appointment of, in cases of lunatics, 643-4.

Either,—

(1.) To appear to writ of summons, and (having appeared) to defend, 643-4.

Or,—

(2.) To defend, 643-4.

Mode of obtaining, and party to obtain, appointment of, 643-4.

**INDORSEMENTS.**—See WRIT OF SUMMONS ; THIRD PARTY NOTICES.

**INFANTS.**—See GUARDIAN AD LITEM ; SPECIAL CASE.

## INFERIOR COURTS—

General jurisdiction of, 629-630.

Appeals from, are to Divisional Court, 630.

Mode of appeal,—

(1.) By special case, 751-2.

(2.) By motion, 752.

See COUNTY COURTS.

## INJUNCTIONS—

Application for, 733-4.

Preventive injunction, time to apply for, 734, 739.

When granted upon terms, 734-5.

Particular orders in nature of, 734, 739.

Applicants for, 734, 739.

See DISCOVERY ; INTERIM ORDERS ; MOTIONS ; RECEIVER.

## INQUIRIES, JUDGMENT FOR—

At any stage in the action, 695.

Sometimes immediately after time for appearance to writ, 695.

Upon notice, 695.

Upon motion for judgment, 702.

Reserves further consideration, 695.

See ACCOUNT, JUDGMENT FOR.

## INSPECTION OF DOCUMENTS.—See DISCOVERY.

## INSPECTION OF PROPERTY—

Either party may have order to inspect property, 680.

Either party may have order to take samples, make observations,  
and try experiments, 680.

See DISCOVERY.

## INTERIM ORDERS—

For injunction, 739.

For receiver, 739.

For preservation of property, 739.

For interim custody of property, 739.

For sale of goods, &c., 739.

For detention of property, 739.

For restitution of property, 739.

Provision for case of lien on property, 739.

Time to apply for, 739.

Person to apply for, 739.

See DISCOVERY ; INJUNCTIONS ; RECEIVER.

## INTERLOCUTORY JUDGMENT—

May direct accounts, inquiries, &c., 695.

May be made at any stage of the action, 695.

May reserve further consideration, 695.

May be made upon motion for judgment, 695.

See APPEAL TO COURT OF APPEAL.

## INTERLOCUTORY ORDER—

For account, 695, 704.

For account immediately after time for appearance to writ, 704.

For account on summons, 695.

For account upon motion, 695.

INTERLOCUTORY ORDER—(*continued.*)

For inquiries, 695, 704.

For injunctions, &c., see INJUNCTIONS ; RECEIVER ; INTERIM ORDERS, &c.

For inspection of property. See INSPECTION OF PROPERTY ; APPEAL TO COURT OF APPEAL.

## INTERPLEADER—

Summons by defendant against third party (claiming adversely to plaintiff), 644.

Time for taking out summons,—

(a.) By private person, 644.

(b.) By sheriff, 645.

Affidavit for, contents of, 644.

Order for, on summons, 644.

Proceedings in, subsequent to order, 644-5.

(a.) Where third party does not appear, 644.

Order is made barring his claim, 644.

(b.) Where third party duly appears, 645.

Then either,—

(1.) A formal trial of the claims, 645.

Or,—

(2.) A summary disposal of the question,—

(a.) By consent of both claimants, 645.

(b.) Where subject-matter is trivial, at request of either of the two claimants, 645.

No appeal after summary disposal, 645.

Proceedings in, upon sheriff's interpleader, 645.

INTERROGATORIES.—See DISCOVERY.

INTERROGATORIES, ANSWER TO.—See DISCOVERY.

## ISSUES—

Preparation of, when necessary, 673.

Preparation of, order for, 673.

Finding of, 701.

Judgment upon finding of, 701-2.

See REFEREE, TRIAL BEFORE.

## JOINDER—

(1.) Of parties,—

(a.) Of plaintiffs, 649.

(b.) Of defendants, 649.

See also MISJOINDER ; NON-JOINDER.

(2.) Of issue,—

Time for, 658.

Effect of, 658.

(3.) Of causes of action,—

What not permitted without leave, 662.

JUDGMENT FOR DEFAULT.—SEE DEFAULT OF APPEARANCE TO WRIT ; DEFAULT OF APPEARANCE AT TRIAL ; DEFAULT OF PLEADING.

## JUDGMENT, VARIETIES OF—

(1.) Final,—when, *e.g.*, execution may issue on it, 694-5.

(2.) Interlocutory,—when, *e.g.*, execution may not yet issue on it, 695.

JUDGMENT, VARIETIES OF—(*continued.*)

May reserve further consideration, 695.

May be for immediate account, 695, 704-5.

## JUDGMENT, VARIOUS GROUNDS FOR—

(1.) For default of appearance to writ, 695-6.

(2.) For default of pleading, 696-7.

(3.) For default of appearance at trial, 698.

(4.) On admissions in the pleadings, 698-699.

(5.) At trial of action, 699-700.

(6.) On motion subsequent to trial, 700-702.

(7.) On motion without trial, 702.

(8.) On motion for new trial, 702-3.

(9.) On trial before referee, 703-4.

## JURISDICTION—

(1.) Of High Court, 625-627.

(2.) Of Court of Appeal, 626.

(3.) Of House of Lords, 626.

(4.) Of Common Law Divisions, 625, 627, 628.

(5.) Of Divisional Courts, 628-629.

(6.) Of County Courts, and other Inferior Courts, 629-630.

## JURY, TRIAL BY—

Right of either party to, 685.

Mode of asserting right, 685.

Sphere for, and limits of, judge's discretion, 685.

Power of judge to direct, 685-6.

## LANDLORDS.—See SUMMONS, WRIT OF.

## LEAVE—

(1.) To issue writ of summons for service out of the jurisdiction, 635-6.

(2.) To make substituted service of writ of summons, or to give notice in lieu of service thereof, 636.

(3.) To serve writ of summons out of the jurisdiction, 637.

(4.) To amend writ of summons, 637-8.

(5.) To appear (in the case of landlords) when action is against tenant for recovery of land, 641-2.

(6.) To appear to an action under Bills of Exchange Act, 1856, 642.

(7.) To issue third-party notice when remedy over is claimed, and generally, 654-6.

(8.) To join with an action for the recovery of land any other cause of action, 662.

(9.) To join with claim by trustee in bankruptcy, claim by him personally, 662.

(10.) To defend an action when writ is specially indorsed, 662-3.

(11.) To plead and demur together to the whole of a previous pleading, 667.

(12.) To plead after demurrer is disposed of, 667.

(13.) To plead a further defence or further reply, 668-9.

(14.) To discontinue entire action at certain stages of it, 687.

(15.) To withdraw entire defence or counter-claim, 669.

(16.) To amend the pleadings in certain cases, and at certain stages of the action, 637-8, 670-672.



**LEAVE—***(continued.)*

- (17.) To set down a special case, when married women, infants, or lunatics are concerned, 674.
- (18.) To countermand notice of trial, 684.
- (19.) To issue execution in certain cases, 721-2.
- (20.) To issue a writ of attachment in all cases, 714.
- (21.) To renew writ of execution, 723.
- (22.) To appeal in certain cases, 630, 750-1.
- (23.) To amend notice of appeal, 753.
- (24.) To adduce further evidence in certain cases on appealing, 759-760.

**LORD MAYOR'S COURT—**

Appeal from, not to Court of Appeal, but to Divisional Court, 630, 751.

**LUNATICS.**—See **GUARDIAN AD LITEM**; **SPECIAL CASE**.

**MALICE—**

Plea of, 661.

**MARRIED WOMEN.**—See **PARTIES**; **SPECIAL CASE**; **SUMMONS**, **WRIT OF**.

**MASTER AND CHIEF CLERK—**

Distinguished, 724-8.

**MISJOINDER—**

- (1.) Of plaintiffs, effect of, as to costs only, 649.  
Of plaintiffs, need not even be amended, 649.
  - (2.) Of defendants, effect of, as to costs only, 649.  
Of defendants, need not even be amended, 649.
- See **JOINDER**; **NON-JOINDER**.

**MOTIONS—**

Various occasions for, in an action, 735-6.  
When they may be *ex parte*, 734-5.  
When they may not be *ex parte*, but must be on notice, 734-5.  
Service of notice of, 735-6.  
Hearing of, 736.  
Evidence upon, 736.  
For rule or order to show cause, cases for, 736-738.  
For particular interlocutory orders, 738-740.  
For order to stay proceedings, 740.  
To dismiss action for want of prosecution, 740.  
For judgment upon third party's default to deliver pleading, 696-7.  
For judgment on admissions in pleadings, 698-699.  
See **MOTION FOR JUDGMENT**.

**MOTION FOR JUDGMENT—**

For default of appearance to writ, 695-7.  
For default of pleading, 696-7.  
Subsequent to report of referee, 703-4.  
Subsequent to trial, 700-2.  
Without previous trial, 702.  
See **MOTIONS**.

**MULTIFARIOUS DEFENDANTS—**

Provision for protection of, 652.

## NEW TRIAL—

Judgment on motion for, 702-3.

Final, upon the merits, 703.

Adjournment for further consideration, 703.

## NON-APPEARANCE AT TRIAL—

By plaintiff, effect of, 688.

By defendant, effect of, 688.

## NON-JOINDER.

(1.) Of plaintiff, remedied, if due to a *bond fide* mistake, 649.

Of plaintiff, remedied, with consent of added or substituted plaintiff, 649.

(2.) Of defendant, remedied, if due to *bond fide* mistake, 649.

Of defendant, remedied, without consent of added or substituted defendant, 649.

See JOINDER ; MISJOINDER.

## NON-SUIT, JUDGMENT OF—

Effect of, 706.

Grounds for setting aside, 706.

## NOT GUILTY BY STATUTE—

Plea of, 660-1.

## NOTICE—

Plea of, 661.

NOTICE OF APPEAL.—See APPEAL TO COURT OF APPEAL.

NOTICE OF CLAIM TO INDEMNITY OVER, 654-6.

NOTICE OF DISCONTINUANCE.—See DISCONTINUANCE.

## NOTICE OF QUESTION—

To be determined in action, 654-6.

## NOTICE OF MOTION—

When necessary, 734-5.

When not necessary, 734-5.

Contents of, 735.

Length of, 735.

Special leave to give short, 735.

Mode of service of, 735-6.

(a.) Where defendant has appeared, 735-6.

(b.) Where defendant has not appeared, 735-6.

Service of (by leave), before appearance, 736.

NOTICE OF TRIAL.—See TRIAL, PRELIMINARIES TO.

NOTICE TO ADMIT DOCUMENTS, 679.

NOTICE TO PRODUCE FOR CROSS-EXAMINATION, 682-3.

## NOTICES TO THIRD PARTIES—

Where remedy over claimed, 654-6.

Where question to be determined against, 654-6.

## ORDER TO SHOW CAUSE—

When it may be granted, and when only, 734, 737-8.

ORDER TO SHOW CAUSE—(*continued.*)

- (1.) On application for a new trial, 734, 737.  
     Whether (a) to Court of Appeal, 734, 737.  
     Or (b) to Divisional Court, 734, 737.
- (2.) On application not in an action, 734, 737-8.
- (3.) On application for a charging order, 735, 738.
- (4.) On application for a garnishee order, 735, 738.

See MOTIONS.

## ORDER TO STAY—

- (1.) Action, 760.  
     Necessary, on appeal from Master's decision, 760.  
     Necessary, on appeal from District Registrar's decision, 760.  
     Necessary, on appeal from High Court, 760.  
     Not necessary, when order made *ex parte* on motion for new trial, 760.
- (2.) Execution, 723-4.  
     On special grounds, 723-4.  
     In lieu of *audita querela*, 724.

## PARTIES—

- Choice of defendants, 649.
- Joinder of plaintiffs, 649.
- Misjoinder of, effect of, 649-650.
- Non-joinder of, effect of, 649-650.
- Representative parties, 650.  
     In questions of construction, for unknown heir, 650.  
     In questions of construction, for unascertained next of kin, 650.  
     In actions generally, trustees for *cestuis que trust*, 650.  
     In actions generally, one or more members of a class, 650.  
     In administration actions, }  
     In actions for execution of a trust, } one beneficiary for all, 651.
- Infants sue by their next friends, 651.
- Infants defend by their guardians *ad litem*, 651.
- Lunatics (so found) sue by their committees, 651.
- Lunatics (so found) defend by their committees, 651.
- Lunatics (so found) and their committees are both made parties  
     (plaintiff or defendant, as the case may be), 651.
- Lunatics (not so found) sue by their next friends, 651.
- Lunatics (not so found) defend by their guardians *ad litem*, 651.
- Lunatics (not so found), and also infants, are made defendants in  
     their own proper names, the guardians *ad litem* not being made  
     parties, 651.
- Married women sue by their next friends, 651.
- Married women defend by themselves and their husbands, 651-2.
- Married women may (with leave) sue without a next friend, 651-2.
- Married women may as to earnings sue by themselves, 651-2.
- Married women may (with leave) defend by themselves, 652.
- Married women may not, as to earnings, defend by themselves, 652.
- Married women as to their equitable separate estate sue by their next  
     friends, 651.
- Married women as to their equitable separate estate defend by them-  
     selves and their husbands, 651.
- Partners sue either in their own or in the partnership name, 652.
- Partners defend either in their own or in the partnership name, 652.
- Partner (sole member of firm) sues in his own name, 652.

**PARTIES—***(continued.)*

Partner (sole member of firm) defends either in his own or in the partnership name, 652.

Landlord (in ejectment) defending by leave, is made a party defendant, 652.

Multifarious defendants may be parties, 652.

Multifarious defendants may escape embarrassment, 652.

May be added, or struck out, or substituted, 652-3.

Mode of adding, &c., 652.

Service of added, &c., defendants with amended writ (with or without amended statement of claim), 652.

Appearance of added, &c., defendants, 653.

Secondary (or cross) parties to counter-claims, 653-4.

Service upon persons already parties to the action, 654.

Service upon persons not already parties to the action, 654.

Subsidiary defendants, 654-6.

Either,—

(1.) Where defendant to action claims a remedy over, if himself liable to plaintiff, 654.

Or,—

(2.) Where either plaintiff or defendant wants the determination of a question in the action to be binding on some third person, 654.

Where remedy over against third person, service upon persons already parties, 655-6.

Where remedy over against third person, service upon persons not already parties, 655-6.

Where determination of question, to be binding against third person, service upon persons not already parties, 656.

Persons made parties by revivor, 656-7.

(a.) Where devolution of interest, by operation of law, 656-7.

(b.) Where devolution of interest, by act of the parties, 657.

(c.) Where devolution of interest, by new person coming into existence, 657.

**PARTNERSHIPS—**

Description of, as parties, 652.

(a.) Being plaintiffs, 652.

(b.) Being defendants, 652.

Appearances of, when defendants, 641.

Execution against, 722.

In general, 722.

In particular cases, 722.

Service of writ of summons upon, 635.

**PAYMENT INTO COURT—**

By defendant in satisfaction, 665.

Either,—

(a.) Of whole cause of action, 665.

Or,—

(b.) Of specified part of cause of action, 665.

Where before delivering defence, notice of, to plaintiff, 665.

Where at time of delivering defence, to be pleaded in defence, 665-6.

Plaintiff's course subsequent to, 665-6.

**PERCENTAGES.—See FEES AND PERCENTAGES.**

## PETITION—

Part of summary statutory jurisdiction, 631.

PETITION OF APPEAL.—See APPEAL TO HOUSE OF LORDS.

## PLEA—

A species of *defence*, 664.

See DEFENCE; DEMURRER; PLEADINGS.

## PLEADINGS—

Succession of, and times for, 658.

(1.) Statement of claim, —within six weeks from defendant's appearance (or time for appearance) to writ of summons, 658.

(2.) Statement of defence, with or without counter-claim, within eight days from plaintiff's delivery of statement of claim, 658.

(3.) Plaintiff's reply, —within three weeks from defendant's delivery of statement of defence (whether with or without counter-claim), 658.

(3a.) Third party's reply, — within eight days from defendant's delivery of statement of defence, 658.

(4.) Simple joinder of issue on reply, — within four days from delivery of reply, 658.

(4a.) Pleading to (otherwise than by simply joining issue on) reply, —within time limited in order giving leave to plead the pleading, 658.

Extension of times for delivery, 659.

Further extension of times for delivering, 659.

Amendment of, 669-672. See AMENDMENT.

Close of, —

Either, —

(a.) Upon simple joinder of issue, 672-3.

Or, —

(b.) Upon default to plead by party, 672-3.

Issues, preparation of, 673. See ISSUES.

Special case, 674. See SPECIAL CASE.

## PLEADINGS, GENERAL CHARACTER OF—

Concise, 659.

Simple and accurate, 659.

Specific and distinct, 659.

Forbidden faults in pleadings, —

(1.) Vagueness, 659.

(2.) Evasiveness, 659.

(3.) Inconsistency, 659.

Relief claimed to be specifically stated, 659.

General relief claimed in alternative, 659.

Counter-claim like claim in cross-action, 659.

Specific denials, 660.

Inconsistent amendments allowed, 660.

General denial by joinder of issue, 660.

## PLEADINGS, PARTICULAR RULES REGARDING—

What printed and what written, 660.

Counter-claim to be so described, 660.

Delivery of, 660.

Pleadings in abatement abolished, 660.

Amendment in lieu of new assignment, 660.

PLEADINGS, PARTICULAR RULES REGARDING—(*continued.*)

- Possession, plea of, 660.
- Equitable title, plea of, 660.
- Not guilty by statute, plea of, 660-1.
- Special defences, pleading of, 661.
- Documents, pleading of, 661.
- Fraud, &c., pleading of, 661.
- Notice, pleading of, 661.
- Presumptions of law, not to be pleaded, 661.

## POSSESSION—

- Plea of, 660.

## POSSESSION, WRIT OF—

- Where judgment for delivery of possession, 713.
- Requisites before issuing, 713.
- Upon judgment for recovery of possession, 713-4.
- Mode of issuing, 713-4.
- Time of issuing, 713-4.

## PRAECIPE.—See EXECUTION.

## PRESUMPTIONS—

- Of law, not to be pleaded, 661.

## PRODUCTION OF DOCUMENTS.—See DISCOVERY.

## PUIS DARREIN CONTINUANCE.—See FURTHER DEFENCE; FURTHER REPLY.

## RECEIVER—

- Application for appointment of, 733-4, 737.
- Time for making application, 734, 737.
- Applicant for, 734, 737.
- See INTERIM ORDERS.

## RE-EXAMINATION.—See WITNESSES, EXAMINATION OF; EVIDENCE VIVA VOCE; AFFIDAVIT, EVIDENCE BY.

## REFEREE, TRIAL BEFORE—

- Cases for, 685-6, 703.
- Referee may submit questions to Court, 703.
- „ „ be required to give his reasons, 704.
- Judgment upon, 703-4.
- Court may adopt or not report, 703.
- Court may remit report, 704.
- Court itself may decide question on evidence, 704.
- Otherwise report is equivalent to verdict, 703-4.
- Motion for judgment subsequent to, 700-3.
- See JUDGMENT, VARIOUS GROUNDS FOR.

## REMOVAL OF ACTION—

- (1.) From District Registry into High Court, 731-2.
    - Removals distinguished from references, 732.
    - Removal, when a matter of right, 732.
    - Removal, when a matter of discretion, 732.
  - (2.) From High Court into District Registry, 732.
    - Removal always a matter of discretion, 732-3.
- See COURT, COUNTY; DISTRICT REGISTRIES.

**RENEWAL—**

- Of writ of summons, 639-640.
- Of writ of execution, 723.
- When to be renewed, 723.
- Renewed by leave only, 723.
- Manner of renewing, 723.

**REPLY—**

- Time for delivery of,—
  - (a.) By plaintiff, 658-9.
  - (b.) By third party, 658-9.
- Plaintiff's reply, usually a simple joinder of issue, 667.
- Plaintiff's reply, when it introduces new matter, 667-8.
- Third party's reply is in effect a defence to counter-claim, 668.

**REPRESENTATIVE PARTIES—**

- (1.) Nominee of court,—
    - For unknown heir-at-law, for unascertained next of kin, in any action involving a question of construction, 650.
  - (2.) Trustees, executors, and administrators, for beneficiaries, 650.
  - (3.) One or more members of class, for class, 650.
  - (4.) One beneficiary for all like beneficiaries, in an administration action, 651.
- See PARTIES ; SUMMONS, WRIT OF.

**REVIVOR—**

- As to parties, where devolution of interest, 656-7.
- Either,—
  - (1.) By operation of law, 656. Or,
  - (2.) By act of the parties, 657. Or,
  - (3.) By new person coming into existence, 657.
- Service of order of revivor as to parties, 657.
- Discharge of order of revivor as to parties, 657.
- Time for, where no effective disability, 657.
- Time for, where some effective disability, 657.
- When no revivor as to parties, 658.
- See also EXECUTION.

**RULE TO SHOW CAUSE.—**See ORDER TO SHOW CAUSE.

**SECONDARY PARTIES.—**See PARTIES.

**SECURITY FOR COSTS—**

- In discretion of court, 745.
- May extend to past and future costs, 745.
- Application for, to be first made out of court, 745.
- Appeal lies regarding, 745.
- Grounds for ordering, 746.
- Application for, should be made without delay, 746.
- On appeals to House of Lords, 756.
- See COSTS.

**SEQUESTARI FACIAS DE BONIS ECCLESIASTICIS, WRIT OF—**

- When it issues, 718.
- Is assistant to writ of *fi. fa.*, 718.
- Is optional substitute for *fi. fa. de bonis ecclesiasticis*, 718.
- Manner of executing, 718.

## SEQUESTRATION, WRIT OF—

When it issues without leave, 716.

Preliminaries to issuing, 716.

Force of, 716-717.

Manner of dealing with proceeds of sequestration, 717.

Accountability of sequestrators, 717.

## SERVICE OF DOCUMENTS—

- (1.) Of writ of summons, 634-5.
  - Time for, 634.
  - Mode of, 634.
  - On husband and wife, 634.
  - On infant, 634-5.
  - On lunatic, 635.
  - On partners, 635.
  - On vacant premises, 635.
- (2.) Of amended writ of summons on added or substituted defendant, 652, 654-6.
- (3.) Of counter-claim, 654.
  - (a.) Upon persons already parties, 654.
  - (b.) Upon persons not already parties, 654.
- (4.) Of defence, where remedy over (in case of primary liability established) is claimed, upon persons already parties, 655.
- (5.) Of notice of claim, where remedy over (in case of primary liability established) is claimed, upon persons not already parties, 655.
- (6.) Of notice of question, where question to be determined in the action is to be binding as against third person, upon persons not already parties, 656.
- (7.) Of order of revivor, as to parties, 657.
  - (a.) Where devolution of interest, by operation of law, 656-7.
  - (b.) Where devolution of interest, by act of the parties, 656-7.
  - (c.) Where devolution of interest, by new person coming into existence, 656-7.
- (8.) Of pleadings, 660.
- (9.) Of amended pleadings, 672.
- (10.) Of plaintiff's confession of defence, 669.
- (11.) Of notice to admit documents, 679.
- (12.) Of notice to produce for cross-examination, 682-3.
- (13.) Of notice of trial, 684.
- (14.) Of notice of discontinuance of action, 687.
- (15.) Of notice of motion for judgment subsequent to trial, 700-2.
- (16.) Of garnishee order *nisi*, 720.
- (17.) Of judgment, 713.
- (18.) Of order to make discovery, 678.
- (19.) Of order to found attachment, 714-6.
- (20.) Of order to found sequestration, 716.
- (21.) Of charging order, 719-720.
- (22.) Of notice of motion, 734-5.
- (23.) Of rule or order *nisi* for new trial, 736-8.
- (24.) Of notice of appeal from County Court, 752.
- (25.) Of notice of appeal to Court of Appeal, 752.
- (26.) Of cross-appeal notice, 752.
- (27.) Of petition of appeal to House of Lords, 756-7.



**SETTING ASIDE—**

Judgments obtained by default, 695-8.

Judgments of non-suit, 706.

**SETTING DOWN—**

Of special case, 674.

Of motion for judgment, 697.

Not of simple motion, 697.

Notice of setting down, 697.

**SOLICITORS.**—See ATTACHMENT; DISCOVERY.

**SPECIAL ALLOWANCES.**—See COSTS, TAXATION OF.

**SPECIAL CASE—**

By consent of parties, after writ issued, 674.

By order of court, where preliminary matter of law, 674.

Printing of, 674.

Filing of, 674.

Entry of, —

In the general case, 674.

Order for, where married women, infants, or lunatics, 674.

**STAMPS.**—See FEES AND PERCENTAGES.

**STATEMENT OF CLAIM—**

Time for delivery of, 658.

General character of, as a pleading, 659-660.

Particular rules of pleading regarding, 660.

May join several causes of action, 661-2.

Exceptions to such joinder, 662.

Where writ specially indorsed, notice equals, 662.

**STATEMENT OF DEFENCE.**—See DEFENCE; DEFENCE AND COUNTER-CLAIM.

**STAY OF PROCEEDINGS—**

When order made on motion for new trial, 760.

In all other cases, no stay, unless by special order, 760.

In what court application for, to be made, 760.

See ORDER TO STAY.

**STAY, ORDER TO.**—See ORDER TO STAY.

**SUBSIDIARY DEFENDANTS.**—See PARTIES.

**SUMMARY PROCEDURE—**

What is, and how distinguished from formal procedure, 630-631.

Under statutes in Chancery Division, 631.

Under statutes in Common Law Divisions, 631.

**SUMMONS—**

Mode of proceeding at Chambers, 741.

Mode of proceeding in District Registries, 741.

**SUMMONS, WRIT OF—**

Preparation of, 631-633.

Issue of, 632.

Indorsement of claim upon, 633-4.

Service of, 634-635.

SUMMONS, WRIT OF—(*continued.*)

- In general, 634.
- Upon husband and wife, 634.
- Upon infants, 634-5.
- Upon lunatics, 635.
- Upon partnerships, 635.
- Upon premises (in ejectment), 635.
- Upon added or substituted defendants, 652-654, 655-6.
- Leave to issue, 635-6.
  - When leave is necessary, 635-6.
  - How leave is obtained, 636.
- Leave to make substituted service of, 636.
- Leave to give notice in lieu of service of, 636.
- Leave to serve out of jurisdiction, 637.
  - How leave is obtained, 637.
  - What the affidavit for leave must show, 637.
- Leave to amend, 637-8.
  - How leave is obtained, 637.
  - Order giving leave is not drawn up, 637-8.
  - By adding, striking out, or substituting parties, 652-6.
- Order to stay proceedings on, 638.
  - Grounds for making order, 638.
  - Order how obtained, 638.
- Order to serve particular persons with, 638-9.
  - Upon wife specially, 638.
  - Upon infant personally, 638.
  - Upon infants and lunatics specially, 639.
  - Where defendants added or substituted, 652-6.
- Issue of concurrent, 639.
  - Mode of issuing, 639.
  - Duration of concurrent, 639.
  - Cases for, 639.
- Renewal of, 639-640.
  - Grounds for, 639.
  - Mode of, and time for, 639.
  - Duration of, 640.
  - Effect of, 640.

## SUMMONSES—

- Various occasions for, in an action, 741.
- Proceedings at Chambers, 741.
- Proceedings in District Registries, 741.
- Cases where option to proceed by summons or by motion, 741.
- Distinction between Chambers at Common Law and in Chancery, 741-2.
- Cases where summons peremptorily prescribed, 742.
- Discretion to be used in proceeding by, 741-2.

## THIRD PARTY NOTICES—

- Where remedy over is claimed, 654-6.
- Where question is to be determined against, 654-6.

## TIME—

- General provisions regarding, 760-761.
- Sundays, &c., 761.
- Long Vacation, 761.

## TIME—(continued.)

Terms, 761.

Month, 760-1.

## Particular provisions regarding, 762.

Writ of summons, 762.

Concurrent writ, 766.

Renewed writ, 766.

Amended writ, 766.

Appearance to writ of summons, 762.

To amended writ of summons, 766.

Statement of claim, 762.

Extension of time, 766.

Amendment of, 766-7.

Re-amendment of, 767.

Statement of defence, 762.

Extension of time, 767.

Amendment of, 767-8.

Re-amendment of, 768.

Demurrer, 762.

Reply of plaintiff, 762.

Extension of time, 768.

Amendment of, 768.

Re-amendment of, 768.

Demurrer, 762.

Reply of third party, 768-9.

Pleading subsequent to reply, 762.

Extension of time, 739.

Amendment of, 740, 741.

Re-amendment of, 741.

Further defence of defendant, 740.

Further reply of plaintiff, 740.

Further reply of third party, 740.

Entry of demurrer, 763.

Evidence by affidavit, 763.

Evidence *viva voce*, 763.

Cross-examination, 763.

Cross-examination on affidavits, 763.

Notice of trial, 763.

Motion for judgment, 764.

Entry of judgment, 764.

Motion for new trial, 764.

From Master to Judge at Chambers, 765, 771.

From Chambers to Court, 765, 771.

For appealing a demurrer, 771.

Appeal to Court of Appeal, 765.

Appeal to House of Lords, 765.

On appeals from interlocutory orders to Court of Appeal, 753-5.

On appeals from refusal of interlocutory order *ex parte*, 753-4.

On appeals from District Registrar, 729.

For execution, issuing, 709-710.

## TITLE, EQUITABLE—

Defendant must plead, 661.

## TRANSFER OF ACTIONS—

Order for, from what court obtained, 648.

TRANSFER OF ACTIONS—(*continued*).

- Order for, effect of, where president of transferee-court consents to it, 648.
- Order for, effect of, where president of transferee-court does not consent to it, 648.
- Order for, when to be applied for in the general case, 648.
- Order for, after decree in administration action, 648-9.
- Order for, after winding-up order, 648-9.
- Common law transfer from division to division, 649.
- Orders of transfer for convenience of suitors, 648, *n*.
- See CONSOLIDATION OF ACTIONS.

## TRIAL OF ACTION—

- Judgment at, 699-700.
  - Simpliciter*, 699.
  - Adjournment for further consideration, 700.
  - No judgment, but leave to move for, 700.
  - Judgment, subject to leave to move, 700.
  - For defendant, on counter-claim, 700.
- Judgment subsequent to, 700-702.
  - On motion for judgment, 700.
  - Where judgment at trial, subject to leave to move, 700.
    - Time for moving, 700.
    - What notice of motion is to state, 700.
  - Where no judgment at trial, but leave to move for, 700-701.
    - Time for moving, 700.
  - Where judgment *simpliciter* at trial, 701.
    - Move without leave, 701.
  - Where issue or issues found at trial, 701.
    - Time for moving, 701.
- Judgment without any, 702.
  - With or without further consideration, 702.
  - Subject or not to trial of issue or issues, 702.
- See also NEW TRIAL ; JUDGMENT.

## TRIAL, MOTION FOR JUDGMENT SUBSEQUENT TO—

- Where judgment at trial subject to leave, 700.
  - Time for motion, 700.
  - Notice of motion, contents of, 700.
- Where no judgment at trial, 700-701.
  - Time for setting down action, 700.
  - Plaintiff's and then defendant's right to set down, 700.
- Where judgment *simpliciter* at trial, 701.
  - Motion to Court of Appeal to set aside and to enter another judgment, 701.
- In cases not otherwise provided for, 701.
- Upon the finding of issues, 701-2.
  - E.g.*, upon report of referee, 701-2.

## TRIAL, PRELIMINARIES TO—

- (1.) Venue of—
  - Usually Middlesex, 684.
  - Party may choose a different venue, 684.
  - Judge may order a change of venue, 684.

TRIAL, PRELIMINARIES TO—(*continued.*)

- (2.) Notice of,—
  - Plaintiff gives notice, within six weeks from close of pleadings, 684.
  - Defendant may afterwards give notice, if plaintiff do not, 684.
  - Of trial or of issues only, 684.
  - Usual notice, ten days, 684.
  - Short notice, four days, 684.
  - Specific mode of trial, 684.
  - To be given before entry of action for trial, 684-5.
  - Becomes void after six days, unless action entered for trial, 684.
  - Countermandable, by consent or with leave only, 684, 687.
- (3.) Mode of, choice of, 685.
  - Right of choice, 685.
  - Judge's discretion, limits of and sphere for, 685.
  - Different modes (by order) for different questions, 685.
  - Compulsory reference to referee, cases for, 685-6.
  - Order at trial for trial of particular issues, 686.
- (4.) Entry for,—
  - Party giving notice of trial enters action within two days, 686.
  - Other party may enter action within next four days, 686.
  - Mode of, and place for, 686-687.

TRIAL, PROCEEDINGS AT—

- (1.) Where one side fails to appear, 688.
  - (a.) Defendant failing, plaintiff proves his case, 688.
    - But judge may postpone trial, 688.
  - (b.) Plaintiff failing, defendant obtains judgment, 688.
    - Defendant having first proved his counter-claim (if any), 688.
    - But judge may postpone trial, 688.
  - Plaintiff or defendant may set aside judgment, upon terms, 688.
- (2.) Where all parties appear, 688.
  - Course of trial, 688.
    - (A.) Before judge without jury, 688-691.
      - (a.) Counsel's opening statement, 688.
      - (b.) Plaintiff's evidence, 689.
        - (aa.) When by affidavit, 689.
        - (bb.) When *viva voce*, 689.
      - (c.) Defendant's evidence, if none, plaintiff's counsel sums up, and defendant's counsel replies; but if defendant puts in evidence, then,—
        - Either (aa.) By affidavit, 690.
        - Or (bb.) *Viva voce*, 690.
      - (d.) Plaintiff's rebutting evidence (by leave only), and if none, then,—defendant sums up his own evidence, and remarks upon the plaintiff's evidence, and upon the law, 690.
      - (e.) Plaintiff's counsel replies upon the whole, 690-1.
    - (B.) Before judge, with jury, 691-692.
      - (a.) Counsel's opening statement, addressed to jury rather than to judge, 691.
      - (b.) Points of law, reservation of, or direction to argue same, 691.

TRIAL, PROCEEDINGS AT—(*continued.*)

(c.) Evidence and summing up evidence, by plaintiffs and defendants respectively, as in trial before judge without jury, 691-2.

(d.) Judge's summing up, 692.

(e.) Verdict of jury, and entry thereof, 692.

(f.) Objection (if any) taken by counsel to judge's direction to jury, 692.

(C.) Before referee (official or special), 692-3.

. Proceedings at, under control of judge, 693.

See JUDGMENT AT TRIAL.

## TRIAL, PROCEEDINGS SUBSEQUENT TO—

To be taken before same judge (if possible), 693-4.

So far as compleatory of judgment, 693.

*Secus*, if by way of appeal or reversal, 693-4.

Motion for judgment, 681-683.

## VENDITIONI EXPONAS, WRIT OF—

When it issues, 717-8.

Is assistant to writ of *fi. fa.*, 718.

Force of, 718.

## VENUE.—See TRIAL, PRELIMINARIES TO.

## WITHDRAWAL—

Of entire action, 669.

Of part grounds of action, by plaintiff, 669.

When without leave, 669.

When only with leave, 669.

Defendant's costs on plaintiff's withdrawal, 669.

Of whole defence, by defendant, only with leave, 669.

Of part defence, by defendant, only with leave, 669.

See DISCONTINUANCE.

## WITNESSES, EXAMINATION OF—

Examination in chief, 688-691.

Cross-examination, 688-691.

Re-examination, 688-691.

See TRIAL ; AFFIDAVIT, EVIDENCE BY ; EVIDENCE, VIVA VOCE.

## WRIT OF EXECUTION.—See EXECUTION.

## WRIT OF SUMMONS.—See SUMMONS, WRIT OF.

## WRITS, ASSISTANT.—See ASSISTANT WRITS.

# A CATALOGUE

OF

## LAW WORKS

PUBLISHED AND SOLD BY

**STEVENS & HAYNES,**

Law Publishers, Booksellers & Exporters,

BELL YARD, TEMPLE BAR,

LONDON.

---

BOOKS BOUND IN THE BEST BINDINGS.

Works in all Classes of Literature supplied to Order.

FOREIGN BOOKS IMPORTED.

LIBRARIES VALUED FOR PROBATE, PARTNERSHIP,  
AND OTHER PURPOSES.

LIBRARIES OR SMALL COLLECTIONS OF BOOKS PURCHASED.

*A large Stock of Reports of the various Courts of England, Ireland,  
and Scotland, always on hand.*

Catalogues and Estimates Furnished, and Orders Promptly Executed.

NOTE.—To avoid confusing our firm with any of a similar name,  
we beg to notify that we have no connexion whatever with any  
other house of business, and we respectfully request that Corre-  
spondents will take special care to direct all communications to  
the above names and address.

# INDEX OF SUBJECTS.

	PAGE		PAGE
ADMIRALTY LAW—		COMMON LAW—	
Jones . . . . .	14	Indermaur . . . . .	24
Kay . . . . .	17	COMMON PLEAS DIVISION, Practice	
Smith . . . . .	23	of—	
AGRICULTURAL HOLDINGS—		Griffith and Loveland . . . . .	6
Brown . . . . .	26	Indermaur . . . . .	25
ARTICLED CLERKS—		COMPANIES LAW—	
<i>See</i> STUDENTS.		Brice . . . . .	16
ARTIZANS AND LABOURERS'		Buckley . . . . .	17
DWELLINGS—		Reilly's Reports . . . . .	29
Lloyd . . . . .	13	Smith . . . . .	39
ASSAULTS—		<i>See</i> MAGISTERIAL LAW.	
<i>See</i> MAGISTERIAL LAW.		COMPENSATION—	
BALLOT ACT—		Browne . . . . .	19
Bushby . . . . .	33	Lloyd . . . . .	13
BANKRUPTCY—		COMPULSORY PURCHASE—	
Baldwin . . . . .	15	Browne . . . . .	19
Ringwood . . . . .	15	CONSTABLES—	
Roche and Hazlitt . . . . .	9	<i>See</i> POLICE GUIDE.	
BAR EXAMINATION JOURNAL	39	CONSTITUTIONAL LAW AND	
BIBLIOGRAPHY . . . . .	40	HISTORY—	
BILLS OF LADING—		Forsyth . . . . .	12
Kay . . . . .	17	Taswell-Langmead . . . . .	21
BILLS OF SALE—		Thomas . . . . .	28
Baldwin . . . . .	15	CONTRACTS—	
Ringwood . . . . .	15	Kay . . . . .	17
Roche and Hazlitt . . . . .	9	CONVEYANCING, Practice of—	
BIRTHS AND DEATHS REGIS-		Copinger (Title Deeds) . . . . .	45
TRATION—		CONVEYANCING, Precedents in—	
Flaxman . . . . .	43	Copinger's Index to . . . . .	40
CAPACITY—		CONVEYANCING, Principles of—	
<i>See</i> PRIVATE INTERNATIONAL		Deane . . . . .	23
LAW.		COPYRIGHT—	
CAPITAL PUNISHMENT—		Copinger . . . . .	45
Copinger . . . . .	42	CORPORATIONS—	
CARRIERS—		Brice . . . . .	16
<i>See</i> RAILWAY LAW.		Browne . . . . .	19
„ SHIPMASTERS.		COSTS, Crown Office—	
CHANCERY DIVISION, Practice of—		Short . . . . .	8
Brown's Edition of Snell . . . . .	22	COVENANTS FOR TITLE—	
Griffith and Loveland . . . . .	6	Copinger . . . . .	45
Indermaur . . . . .	25	CREW OF A SHIP—	
And <i>See</i> EQUITY.		Kay . . . . .	17
CHARITABLE TRUSTS—		CRIMINAL LAW—	
Cooke . . . . .	10	Copinger . . . . .	42
Whiteford . . . . .	20	Harris . . . . .	27
CHURCH AND CLERGY—		Moncreiff . . . . .	42
Brice . . . . .	8	<i>See</i> MAGISTERIAL LAW.	
CIVIL LAW—		CROWN LAW—	
<i>See</i> ROMAN LAW.		Forsyth . . . . .	12
CODES—		Hall . . . . .	30
Argles . . . . .	32	Kelyng . . . . .	35
COLLISIONS AT SEA—		Taswell-Langmead . . . . .	21
Kay . . . . .	17	Thomas . . . . .	28
COLONIAL LAW—		CROWN PRACTICE—	
Cape Colony . . . . .	38	Corner . . . . .	10
Forsyth . . . . .	12	CUSTOM AND USAGE—	
New Zealand Jurist . . . . .	18	Browne . . . . .	19
New Zealand Statutes . . . . .	18	Mayne . . . . .	38



INDEX OF SUBJECTS—*continued.*

CUSTOMS—	PAGE	GAME LAWS—	PAGE
See MAGISTERIAL LAW.		Locke . . . . .	32
DAMAGES—		See MAGISTERIAL LAW.	
Mayne . . . . .	31	HACKNEY CARRIAGES—	
DECREES AND ORDERS—		See MAGISTERIAL LAW.	
Pemberton . . . . .	41	HINDU LAW—	
DICTIONARIES—		Coghlan . . . . .	28
Brown . . . . .	26	Cunningham . . . . .	38
DIGESTS—		Mayne . . . . .	38
Law Magazine Quarterly Digest .	37	Michell . . . . .	44
Indian Jurist . . . . .	38	HISTORY—	
Menzies' Digest of Cape Reports	38	Braithwaite . . . . .	41
DISCOVERY AND INTERROGA-		Taswell-Langmead . . . . .	21
TORIES—		HYPOTHECATION—	
Griffith and Loveland's Edition of		Kay . . . . .	17
the Judicature Acts . . . . .	6	INDEX TO PRECEDENTS—	
DOMICIL—		Copinger . . . . .	40
See PRIVATE INTERNATIONAL		INDIA—	
LAW.		See HINDU LAW.	
DUTCH LAW . . . . .	38	INFANTS—	
ECCLESIASTICAL LAW—		Simpson . . . . .	43
Brice . . . . .	8	INJUNCTIONS—	
Smith . . . . .	23	Joyce . . . . .	11
EDUCATION ACTS—		INSTITUTE OF THE LAW—	
See MAGISTERIAL LAW.		Brown's Law Dictionary . . . . .	26
ELECTION LAW & PETITIONS—		INTERNATIONAL LAW—	
Bushby . . . . .	33	Clarke . . . . .	44
Hardcastle . . . . .	33	Foote . . . . .	36
O'Malley and Hardcastle . . . . .	33	Law Magazine . . . . .	37
EQUITY—		INTERROGATORIES AND DIS-	
Choyce Cases . . . . .	35	COVERY—	
Pemberton . . . . .	32 and 41	Griffith and Loveland's Edition of	
Snell . . . . .	22	the Judicature Acts . . . . .	6
EVIDENCE—		INTOXICATING LIQUORS—	
See USAGES AND CUSTOMS.		See MAGISTERIAL LAW.	
EXAMINATION OF STUDENTS—		JOINT STOCK COMPANIES—	
Bar Examination Journal . . . . .	39	See COMPANIES.	
Indermaur . . . . .	24 and 25	JUDGMENTS AND ORDERS—	
EXCHEQUER DIVISION, Practice of—		Pemberton . . . . .	41
Griffith and Loveland . . . . .	6	JUDICATURE ACTS—	
Indermaur . . . . .	25	Cunningham and Mattinson . . . . .	7
EXTRADITION—		Griffith . . . . .	6
Clarke . . . . .	44	Indermaur . . . . .	25
See MAGISTERIAL LAW.		JURISPRUDENCE—	
FACTORIES—		Forsyth . . . . .	12
See MAGISTERIAL LAW.		JUSTINIAN'S INSTITUTES—	
FISHERIES—		Campbell . . . . .	47
See MAGISTERIAL LAW.		Harris . . . . .	20
FIXTURES—		LANDS CLAUSES CONSOLIDA-	
Brown . . . . .	26	TION ACT—	
FOREIGN LAW—		Lloyd . . . . .	13
Argles . . . . .	32	LARCENY—	
Dutch Law . . . . .	38	See MAGISTERIAL LAW.	
Foote . . . . .	36	LAW DICTIONARY—	
Harris . . . . .	47	Brown . . . . .	26
FORGERY—		LAW MAGAZINE & REVIEW .	37
See MAGISTERIAL LAW.		LEADING CASES—	
FRAUDULENT CONVEYANCES—		Common Law . . . . .	25
May . . . . .	29	Constitutional Law . . . . .	28
GAIUS INSTITUTES—		Equity and Conveyancing . . . . .	25
Harris . . . . .	20	Hindu Law . . . . .	20

INDEX OF SUBJECTS—*continued.*

	PAGE		PAGE
LEADING STATUTES—		PARLIAMENT—	
Thomas . . . . .	28	Taswell-Langmead . . . . .	21
LEASES—		Thomas . . . . .	28
Copinger . . . . .	45	PARLIAMENTARY PRACTICE—	
LEGACY AND SUCCESSION—		Browne . . . . .	19
Hanson . . . . .	10	Smethurst . . . . .	18
LEGITIMACY AND MARRIAGE—		PARTITION—	
See PRIVATE INTERNATIONAL LAW.		Walker . . . . .	43
LICENSES—		PASSENGERS—	
See MAGISTERIAL LAW.		See MAGISTERIAL LAW.	
LIFE ASSURANCE—		„ RAILWAY LAW.	
Buckley . . . . .	29	PASSENGERS AT SEA—	
Reilly . . . . .	29	Kay . . . . .	17
LIMITATION OF ACTIONS—		PAWNBROKERS—	
Banning . . . . .	42	See MAGISTERIAL LAW.	
LIQUIDATION with CREDITORS—		PERSONATION AND IDENTITY—	
Baldwin . . . . .	15	Moriarty . . . . .	14
Ringwood . . . . .	15	PILOTS—	
Roche and Hazlitt . . . . .	9	Kay . . . . .	17
And see BANKRUPTCY.		POLICE GUIDE—	
LLOYD'S BONDS . . . . .	14	Greenwood and Martin . . . . .	46
MAGISTERIAL LAW—		POLLUTION OF RIVERS—	
Greenwood and Martin . . . . .	46	Higgins . . . . .	30
MALICIOUS INJURIES—		PRACTICE BOOKS—	
See MAGISTERIAL LAW.		Bankruptcy . . . . .	9 and 15
MARRIAGE and LEGITIMACY—		Companies Law . . . . .	29 and 39
Foote . . . . .	36	Compensation . . . . .	13
MARRIED WOMEN'S PROPERTY ACTS—		Compulsory Purchase . . . . .	19
Walker's Edition of Griffith . . . . .	40	Conveyancing . . . . .	45
MASTER AND SERVANT—		Damages . . . . .	31
See SHIPMASTERS & SEAMEN.		Ecclesiastical Law . . . . .	8
MASTERS AND SERVANTS—		Election Petitions . . . . .	33
See MAGISTERIAL LAW.		Equity . . . . .	22 and 32
MERCANTILE LAW . . . . .	32	High Court of Justice . . . . .	6 and 25
See SHIPMASTERS & SEAMEN.		Injunctions . . . . .	11
„ STOPPAGE IN TRANSITU.		Judicature Acts . . . . .	6 and 25
MERCHANDISE MARKS—		Magisterial . . . . .	46
Daniel . . . . .	42	Pleading, Precedents of . . . . .	7
MINES—		Privy Council . . . . .	44
Harris . . . . .	47	Railways . . . . .	14
See MAGISTERIAL LAW.		Railway Commission . . . . .	19
MORTMAIN—		Rating . . . . .	19
See CHARITABLE TRUSTS.		Supreme Court of Judicature . . . . .	6 and 25
NATIONALITY—		PRECEDENTS OF PLEADING—	
See PRIVATE INTERNATIONAL LAW.		Cunningham and Mattinson . . . . .	7
NEGLIGENCE—		PRIMOGENITURE—	
Campbell . . . . .	40	Lloyd . . . . .	15
NEW ZEALAND—		PRINCIPLES—	
Jurist Journal and Reports . . . . .	18	Brice (Corporations) . . . . .	16
Statutes . . . . .	18	Browne (Rating) . . . . .	19
OBLIGATIONS—		Deane (Conveyancing) . . . . .	23
Brown's Savigny . . . . .	20	Harris (Criminal Law) . . . . .	27
		Houston (Mercantile) . . . . .	32
		Indermaur (Common Law) . . . . .	24
		Joyce (Injunctions) . . . . .	11
		Ringwood (Bankruptcy) . . . . .	15
		Snell (Equity) . . . . .	22

INDEX OF SUBJECTS—*continued.*

	PAGE		PAGE
PRIORITY—		SANITARY ACTS—	
Robinson . . . . .	32	See MAGISTERIAL LAW.	
PRIVATE INTERNATIONAL		SCOTLAND, LAWS OF—	
LAW—		Robertson . . . . .	41
Foote . . . . .	36	SEA SHORE—	
PRIVY COUNCIL—		Hall . . . . .	30
Michell . . . . .	44	SHIPMASTERS AND SEAMEN—	
PROBATE—		Kay . . . . .	17
Hanson . . . . .	10	SOCIETIES—	
PUBLIC WORSHIP—		See CORPORATIONS.	
Brice . . . . .	8	STAGE CARRIAGES—	
QUEEN'S BENCH DIVISION, Practice		See MAGISTERIAL LAW.	
of—		STAMP DUTIES—	
Griffith and Loveland . . . . .	6	Copinger . . . . .	40 and 45
Indermaur . . . . .	25	STATUTE OF LIMITATIONS—	
QUESTIONS FOR STUDENTS—		Banning . . . . .	42
Indermaur . . . . .	25	STATUTES—	
Bar Examination Journal . . . . .	39	Hardcastle . . . . .	9
RAILWAYS—		New Zealand . . . . .	18
Browne . . . . .	19	Revised Edition . . . . .	12
Godefroi and Shortt . . . . .	14	Thomas . . . . .	28
Goodeve . . . . .	29	STOPPAGE IN TRANSITU—	
Lloyd . . . . .	13	Houston . . . . .	32
See MAGISTERIAL LAW.		Kay . . . . .	17
RATING—		STUDENTS' BOOKS . . . . .	20—28, 39, 47
Browne . . . . .	19	SUCCESSION DUTIES—	
REAL PROPERTY—		Hanson . . . . .	10
Deane . . . . .	23	SUCCESSION LAWS—	
REFEREES COURT—		Lloyd . . . . .	13
Smethurst . . . . .	18	SUPREME COURT OF JUDICA-	
REGISTRATION OF BIRTHS		TURE, Practice of—	
AND DEATHS—		Cunningham and Mattinson . . . . .	7
Flaxman . . . . .	43	Griffith and Loveland . . . . .	6
REMINISCENCE—		Indermaur . . . . .	25
Braithwaite . . . . .	41	TELEGRAPHS—	
REPORTS—		See MAGISTERIAL LAW.	
Bellewe . . . . .	34	TITLE DEEDS—	
Brooke . . . . .	35	Copinger . . . . .	45
Choyce Cases . . . . .	35	TOWNS IMPROVEMENTS—	
Cooke . . . . .	35	See MAGISTERIAL LAW.	
Cunningham . . . . .	34	TRADE MARKS—	
Election Petitions . . . . .	33	Daniel . . . . .	42
Finlason . . . . .	32	TREASON—	
Gibbs, Case of Lord Henry Sey-		Kelyng . . . . .	35
mour's Will . . . . .	10	Taswell-Langmead . . . . .	21
Kelyng, John . . . . .	35	TRIALS—	
Kelynge, William . . . . .	35	Queen v. Gurney . . . . .	32
New Zealand Jurist . . . . .	18	ULTRA VIRES—	
Reilly . . . . .	29	Brice . . . . .	16
Showder (Cases in Parliament) . . . . .	34	USAGES AND CUSTOMS—	
RITUAL—		Browne . . . . .	19
Brice . . . . .	8	Mayne . . . . .	38
ROMAN LAW—		VOLUNTARY CONVEYANCES—	
Brown's Analysis of Savigny . . . . .	20	May . . . . .	29
Campbell . . . . .	47	WATER COURSES—	
Harris . . . . .	20	Higgins . . . . .	30
SALVAGE—		WILLS, CONSTRUCTION OF—	
Jones . . . . .	14	Gibbs, Report of Wallace v.	
Kay . . . . .	17	Attorney-General . . . . .	10

In one thick volume, 8vo., price 30s., cloth lettered,

THE

# SUPREME COURT OF JUDICATURE ACTS

1873, 1875 & 1877 :

## THE APPELLATE JURISDICTION ACT, 1876,

AND

### THE RULES, ORDERS, AND COSTS THEREUNDER :

EDITED WITH NOTES, REFERENCES, AND A COPIOUS  
ANALYTICAL INDEX.

Second Edition.

EMBODYING ALL THE REPORTED CASES TO MICHAELMAS SITTINGS, 1877,  
AND A TIME TABLE.

BY

WILLIAM DOWNES GRIFFITH,

Of the Inner Temple, Barrister-at-Law and a Judge of County Courts ;  
Author of "Griffith's Bankruptcy," &c.

AND

RICHARD LOVELAND LOVELAND,

Of the Inner Temple, Barrister-at-Law ; Editor of "Kelyng's Crown Cases,"  
"Shower's Cases in Parliament," and "Hall's Essay on the Rights of the  
Crown in the Seashore," &c.

#### REVIEWS.

"Our modern reform is real, and it is certainly beneficent, and depending as it does much upon the decisions of the judges, it is no small advantage that it is so ably explained by such authors and editors as Mr. Griffith and Mr. Loveland."—*The Law Times*.

"Much care and industry have been shown in the collection of the cases and the arrangement of the book, and the facilities given by the mode of printing enable the reader to find his way readily to any part of the Acts or Rules he may wish to consult."—*Solicitors' Journal*.

"Mr. W. Downes Griffith appears to have met with the success which we confidently anticipated for his book when it first came out. His system of annotation remains fuller than that of most of his contemporaries, and rises not unfrequently to the

rank of an *Excursus* on a branch of Law."—*Law Magazine and Review*.

"If continued popularity should not await this most practical and exhaustive exposition of the working of the Supreme Court of Judicature Acts and Orders, we can only say that it will not be because the editors have not fulfilled their aim, in rendering it a sure and useful guide to the new procedure."—*Irish Law Times*.

"The authors deserve the gratitude and appreciation of those who consult this work, for (as we have often observed) references to cited cases to *all* the authorities is of the utmost consequence to those gentlemen in the legal profession whose libraries are of limited extent. This work is highly commendable . . ."—*Law Journal*.

"Of the many editions of the Judicature Acts which have appeared, there is certainly none which can be fairly compared with it. The original portion of the work—the editorial notes—is admirably done. It appears to embody, as stated in the title page, 'all the reported cases to Michaelmas sittings 1877,' and these cases are fully and clearly digested; but in addition to the work of citation, the editors have supplied a large amount of valuable annotation on the old rules of pleading, practice, and procedure, as affected by the new. We may refer as examples to the Notes on Pleading, p. 254; Demurrer, p. 288; Discovery and Inspection, p. 306; and Change of Parties, p. 417. A cursory glance at these notes will satisfy any lawyer as to the value of the work. The Time-table, which contains in double column a list of the various proceedings in an action, and a statement of the time limited in respect of each, is sure to be appreciated by the practitioner. The Index, which extends over 164 pages, is full and complete."—*New Zealand Jurist*.

In 8vo. (October), 1878, price 28s., cloth,

# A SELECTION OF PRECEDENTS OF PLEADING

Under the Judicature Acts  
IN THE COMMON LAW DIVISIONS.

With Notes explanatory of the different Causes of Action and Grounds of Defence; and an Introductory Treatise on the Present Rules and Principles of Pleading as illustrated by the various Decisions down to the present time.

By JOHN CUNNINGHAM,

Of the Middle Temple, Barrister-at-Law, Author of the "Law Relating to Parliamentary and Municipal Elections;" and

MILES WALKER MATTINSON,

Of Gray's Inn, Barrister-at-Law.

---

## REVIEWS.

### IRISH LAW TIMES.

"The notes are very pertinent and satisfactory; the introductory chapters on the present system of pleading are excellent, and the precedents will be found very useful."

### LAW JOURNAL.

"Good pleading in the present day demands literary talent, as well as legal knowledge. The art of composition is a rare accomplishment, even among well educated men; and so, when the pleader is called upon to state his case with brevity and lucidity, he is fairly overwhelmed with the task. For the sake of these incompetent writers—and they are, for obvious reasons, to be found among very learned and very clever lawyers—we welcome the work before us. A man who is a good lawyer and a master of the art of English composition will, perhaps, never trouble himself to use this book. He will do his work quicker and better by mastering his case, and proceeding to state it in his own style. But the indifferent scholars will certainly derive very great help from this volume; and we earnestly commend it to their notice, not only for their own sakes, but also in mercy to the more delicate and fastidious eyes and ears of literary lawyers. . . . For pupils, also, and beginners at the bar, the book will be very useful; because these, never having served an apprenticeship to the old system, are very apt to omit allegations, essential in certain cases to the validity of a pleading. The authors of the book before us have introduced their collection of forms to the reader by an essay on pleading under the new rules; and we think that a perusal of this essay, which is written in an attractive style, would do a great deal of good both to barristers and masters. . . . The order of precedents is determined by their subject-matter, and the several subjects follow according to the rule of alphabetical precedence. In the appendix the rules on pleading are collected in one view, and there is a full index to the work. We think that the authors have deserved well of the profession, and that they have produced a book likely to grow in favour even among those who at first might conceive a prejudice against a work of this kind."

### LAW MAGAZINE AND REVIEW.

"Messrs. Cunningham and Mattinson come forward opportunely to take up ground which, since the passing of the Judicature Acts, seems to be awaiting the first occupant. A work which, in the compass of a single portable volume, contains a brief Treatise on the Principles and Rules of Pleading, and a carefully annotated body of Forms which have to a great extent gone through the entirely separate sifting processes of Chambers, Court, and Judges' Chambers, cannot fail to be a most useful companion in the Practitioner's daily routine. And readiness of reference, clearly one of the desiderata in such a book, has been studied by the authors in their adoption of the alphabetical arrangement for the Precedents."

### SOLICITORS' JOURNAL.

"The authors of the present work state in their preface that the various pleadings which are contained in the body of the work have, in nearly every case, been settled by counsel of standing at the bar, and formed part of the record in cases that have been carried on up to trial, or actually tried, since the Judicature Acts came into operation. Such pleadings, as the authors observe, possess the advantage of having passed the adverse criticism of opposing counsel, and, in some cases, the ordeal of a contest at judges' chambers or in court. As far as we can judge, the authors have exercised a careful and sound judgment in their selection. The work contains a treatise on the new rules of pleading which is well written, but would bear compression. To most of the precedents there are notes referring to the decisions which are most useful to the pleader in connection with the particular cause of action involved. We are disposed to think that this is the most valuable portion of the work. It is extremely convenient to have some work which collects notes of this sort in connection with pleading."

In 8vo., price 10s., cloth,

# THE TAXATION OF COSTS IN THE CROWN OFFICE.

COMPRISING A COLLECTION OF

*Bills of Costs in the various matters Taxable in that Office;*  
INCLUDING COSTS UPON THE

PROSECUTION OF FRAUDULENT BANKRUPTS,  
AND ON APPEALS FROM INFERIOR COURTS;

TOGETHER WITH

A TABLE OF COURT FEES,  
AND A SCALE OF COSTS USUALLY ALLOWED TO SOLICITORS ON  
THE TAXATION OF COSTS

ON THE CROWN SIDE OF THE QUEEN'S BENCH DIVISION OF THE HIGH  
COURT OF JUSTICE.

By FREDK. H. SHORT,

CHIEF CLERK IN THE CROWN OFFICE.

"This is decidedly a useful work on the subject of those costs which are liable to be taxed before the Queen's Coroner and Attorney (for which latter name that of 'Solicitor' might now well be substituted), or before the master of the Crown Office; in fact, such a book is almost indispensable when preparing costs for taxation in the Crown Office, or when taxing an opponent's costs. Country solicitors will find the scale relating to bankruptcy prosecutions of especial use, as such costs are taxed in the Crown Office. The 'general observations' constitute a useful feature in this manual."—*Law Times*.

"This book contains a collection of bills of costs in the various matters taxable in the Crown Office. When we point out that the only scale of costs available for the use of the general body of solicitors is that published in Mr. Corner's book on 'Crown Practice' in 1844, we have said quite enough to prove the utility of the work before us.

"In them Mr. Short deals with 'Perusals,' 'Copies for Use,' 'Affidavits,' 'Agency,' 'Correspondence,' 'Close Copies,' 'Counsel,' 'Affidavit of Increase,' and kindred matters; and adds some useful remarks on taxation of 'Costs in Bankruptcy Prosecutions,' 'Quo Warranto,' 'Mandamus,' 'Indictments,' and 'Rules.'

"We have rarely seen a work of this character better executed, and we feel sure that it will be thoroughly appreciated."—*Law Journal*.

"The recent revision of the old scale of costs in the Crown Office renders the appearance of this work particularly opportune, and it cannot fail to be welcomed by practitioners. Mr. Short gives, in the first place, a scale of costs usually allowed to Solicitors on the taxation of costs in the Crown Office, and then bills of costs in various matters. These are well arranged and clearly printed."—*Solicitors' Journal*.

In one volume, 8vo., 1875, price 28s., cloth,

# THE LAW RELATING TO PUBLIC WORSHIP;

WITH SPECIAL REFERENCE TO

Matters of Ritual and Ornamentation,

AND THE MEANS OF SECURING THE DUE OBSERVANCE THEREOF,  
AND CONTAINING IN EXTENSO,

WITH NOTES AND REFERENCES,

THE PUBLIC WORSHIP REGULATION ACT, 1874; THE  
CHURCH DISCIPLINE ACT; THE VARIOUS ACTS OF  
UNIFORMITY; THE LITURGIES OF 1549, 1552, AND 1559,  
COMPARED WITH THE PRESENT RUBRIC;

THE CANONS; THE ARTICLES;

AND THE

INJUNCTIONS, ADVERTISEMENTS, AND OTHER ORIGINAL  
DOCUMENTS OF LEGAL AUTHORITY.

By SEWARD BRICE, LL.D.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"To the vast number of people who in various ways are interested in the working of the Act, Mr. Brice's volume cannot fail to be welcome. It is well conceived and carefully executed."—THE TIMES.

In one volume, 8vo., 1879, price 20s., cloth,

# A TREATISE

## ON THE RULES WHICH GOVERN

## THE CONSTRUCTION AND EFFECT

### OF

# STATUTORY LAW.

### WITH AN APPENDIX

Of certain Words and Expressions used in Statutes, which have been  
Judicially or Statutably construed.

By HENRY HARDCASTLE,  
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

*Editor of "Bushby's Election Law," "Hardcastle's Election Petitions,"  
and Joint-Editor of "Election Petition Reports."*

"A vast amount of information will be found in its pages—much of it arranged so as to be got at without much difficulty. The chapters and sections being headed with lines of indication. We can only hope Mr. Hardcastle will receive that measure of success to which the amount of labour which he has evidently bestowed upon the work entitles him."—*Law Times*.

"Its method and object are excellent, and it appears to be the fruit of much careful study."—*Daily News*.

In one thick volume, 8vo., 1873, price 30s., cloth,

## THE LAW AND PRACTICE IN BANKRUPTCY;

Comprising the Bankruptcy Act, 1869; the Debtors Act, 1869; the Insolvent Debtors and Bankruptcy Repeal Act, 1869; together with the General Rules and Orders in Bankruptcy, at Common Law and in the County Courts;

**With the Practice on Procedure to Adjudication, Procedure to Liquidation, Procedure to Composition, and Procedure under Debtors' Summons, Scales of Costs and of Allowance to Witnesses.**

Copious Notes, References, and a very full Index. Second Edition. By HENRY PHILIP ROCHE and WILLIAM HAZLITT, Barristers-at-Law, and Registrars of the Court of Bankruptcy.

Third Edition, in 8vo., 1876, price 25s., cloth,

# THE ACTS RELATING TO PROBATE, LEGACY, AND SUCCESSION DUTIES.

COMPRISING THE

36 GEO. III., CAP. 52; 45 GEO. III., CAP. 28; 55 GEO. III., CAP. 184;

AND 16 & 17 VICT., CAP. 51;

WITH AN INTRODUCTION, COPIOUS NOTES, AND REFERENCES

*To all the Decided Cases in England, Scotland, and Ireland;*

AN APPENDIX OF STATUTES, TABLES, AND A FULL INDEX.

By ALFRED HANSON,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW;

COMPTROLLER OF LEGACY AND SUCCESSION DUTIES.

**Third Edition,**

INCORPORATING THE CASES TO MICHAELMAS SITTINGS, 1876.

"It is the only complete book upon a subject of great importance.

"Mr. Hanson is peculiarly qualified to be the adviser at such a time. Hence a volume without a rival."—*Law Times*.

"His book is in itself a most useful one; its author knows every in and out of the subject, and has presented the whole in a form easily and readily handled, and with good arrangement and clear exposition."—*Solicitors' Journal*.

In royal 8vo., 1877, price 10s., cloth,

*LES HOSPICES DE PARIS ET DE LONDRES.*

## THE CASE OF LORD HENRY SEYMOUR'S WILL

(WALLACE *v.* THE ATTORNEY-GENERAL).

Reported by FREDERICK WAYMOUTH GIBBS, C.B., Barrister-at-Law,  
late Fellow of Trinity College, Cambridge.

In preparation, and to be published immediately new Rules are issued,

## CORNER'S CROWN PRACTICE:

Being the Practice of the Crown Side of the Queen's Bench Division of the High Court of Justice; with an Appendix of Rules, Forms, Scale of Costs and Allowances, &c.

SECOND EDITION.

By FREDERICK H. SHORT, of the Crown Office, and R. L. LOVELAND,

*Of the Inner Temple, Barrister-at-Law, Editor of "Kelyng's Crown Cases," and*

*"Hall's Essay on the Rights of the Crown in the Sea Shore."*

In 8vo., 1867, price 16s., cloth,

## THE CHARITABLE TRUSTS ACTS, 1853, 1855, 1860;

THE CHARITY COMMISSIONERS JURISDICTION ACT, 1862;

THE ROMAN CATHOLIC CHARITIES ACTS:

Together with a Collection of Statutes relating to or affecting Charities, including the Mortmain Acts, Notes of Cases from 1853 to the present time, Forms of Declarations of Trust, Conditions of Sale, and Conveyance of Charity Land, and a very copious Index. Second Edition.

By HUGH COOKE and R. G. HARWOOD, of the Charity Commission.

"Charities are so numerous, so many persons are directly or indirectly interested in them, they are so much abused, and there is such a growing desire to rectify those abuses and to call in the aid of the commissioners for a more beneficial application of their funds and we are not surprised to receive a

second edition of a collection of all the statutes that regulate them, admirably annotated by two such competent editors as Messrs. Cooke and Harwood, whose official experience peculiarly qualifies them for the task."—*Law Times*.



In one volume, royal 8vo., 1877, price 30s., cloth,

# THE DOCTRINES AND PRINCIPLES OF THE LAW OF INJUNCTIONS.

By WILLIAM JOYCE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

"Mr. Joyce, whose learned and exhaustive work on 'The Law and Practice of Injunctions,' has gained such a deservedly high reputation in the Profession, now brings out a valuable companion volume on the 'Doctrines and Principles' of this important branch of the Law. In the present work the Law is enunciated in its abstract rather than its concrete form, as few cases as possible being cited; while at the same time no statement of a principle is made unsupported by a decision, and for the most part the very language of the Courts has been adhered to. Written as it is by so acknowledged a master of his subject, and with the conscientious carefulness that might be expected from him, this work cannot fail to prove of the greatest assistance alike to the Student—who wants to grasp principles freed from their superincumbent details—and to the Practitioner, who wants to refresh his memory on points of Doctrine amidst the oppressive details of professional work."—*Law Magazine and Review*.

BY THE SAME AUTHOR,

In two volumes, royal 8vo., 1872, price 70s., cloth,

# THE LAW AND PRACTICE OF INJUNCTIONS.

EMBRACING ALL THE SUBJECTS IN WHICH

COURTS OF EQUITY AND COMMON LAW  
HAVE JURISDICTION.

By WILLIAM JOYCE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

## REVIEWS.

"A work which aims at being so absolutely complete, as that of Mr. Joyce upon a subject which is of almost perpetual recurrence in the Courts, cannot fail to be a welcome offering to the profession and, doubtless, it will be well received and largely used, for it is as absolutely complete as it aims at being. . . . This work is, therefore, eminently a work for the practitioner, being full of practical utility in every page, and every sentence, of it. . . . We have to congratulate the profession on this new acquisition to a digest of the law, and the author on his production of a work of permanent utility and fame."—*Law Magazine and Review*.

"Mr. Joyce has produced not a treatise but a complete and compendious *exposition* of the Law and Practice of Injunctions both in equity and common law.

"Part III. is devoted to the practice of the Courts. Contains an amount of valuable and technical matter nowhere else collected.

"From these remarks it will be sufficiently perceived what elaborate and painstaking industry, as well as legal knowledge and ability, has been necessary in the compilation of Mr. Joyce's work. No labour has been spared to save the practitioner labour, and no research has been omitted which could tend towards the elucidation and exemplification of the general principles of the Law and Practice of Injunctions."—*Law Journal*.

"He does not attempt to go an inch beyond that for which he has express written authority; he allows the cases to speak, and does not speak for them.

"The work is something more than a treatise on the Law of Injunctions. It gives us the general law on almost every subject to which the process of injunction is applicable. Not only English, but American decisions are cited, the aggregate number being 3,500, and the statutes cited 160, whilst the index is, we think, the most elaborate we have ever seen—occupying nearly 200 pages. The work is probably entirely exhaustive."—*Law Times*.

"This work, considered either as to its matter or manner of execution, is no ordinary work. It is a complete and exhaustive treatise both as to the law and the practice of granting injunctions. It must supersede all other works on the subject. The terse statement of the practice will be found of incalculable value. We know of no book as suitable to supply a knowledge of the law of injunctions to our common law friends as Mr. Joyce's exhaustive work. It is alike indispensable to members of the Common Law and Equity Bars. Mr. Joyce's great work would be a casket without a key unless accompanied by a good index. His index is very full and well arranged. We feel that this work is destined to take its place as a standard text-book, and the text-book on the particular subject of which it treats. The author deserves great credit for the very great labour bestowed upon it. The publishers, as usual, have acquitted themselves in a manner deserving of the high reputation they bear."—*Canada Law Journal*.

In one volume, royal 8vo., 1869, price 30s., cloth,

# CASES & OPINIONS ON CONSTITUTIONAL LAW, AND VARIOUS POINTS OF ENGLISH JURISPRUDENCE.

Collected and Digested from Official Documents and other Sources; with Notes. By WILLIAM FORSYTH, M.A., M.P., Q.C., Standing Counsel to the Secretary of State in Council of India, Author of "Hortensius," "History of Trial by Jury," "Life of Cicero," etc., late Fellow of Trinity College, Cambridge.

## From the CONTEMPORARY REVIEW.

"We cannot but regard with interest a book which, within moderate compass, presents us with the opinions or *responsa* of such lawyers and statesmen as Somers, Holt, Hardwicke, Mansfield, and, to come down to our own day, Lyndhurst, Abinger, Denman, Cranworth, Campbell, St. Leonards, Westbury, Chelmsford, Cockburn, Cairns, and the present Lord Chancellor Hatherley. At the end of each chapter of the 'Cases and Opinions,' Mr. Forsyth has added notes of his own, containing a most excellent summary of all the law bearing on that branch of his subject to which the 'Opinions' refer. . . . Our space precludes us from dwelling upon the contents of this work at any greater length, but we think we have said enough to show that it is worthy of a place on the book-shelves of our statesmen, and all who take an interest in constitutional, or rather, national and colonial questions."

## From the LAW MAGAZINE and LAW REVIEW.

"Mr. Forsyth has largely and beneficially added to our legal stores. His work may be regarded as in some sense a continuation of 'Chalmers's Opinions of Eminent Lawyers.' . . . The constitutional relations between England and her colonies are becoming every day of more importance. The work of Mr. Forsyth will do more to make these relations perfectly clear than any which has yet appeared. Henceforth it will be the standard work of reference in a variety of questions which are constantly presenting themselves for solution both here and in our colonies. . . . Questions of colonial law by no means occupy an exclusive share of the volume. . . . Among other questions on which 'opinions' are given, and of which careful summaries and generalisations have been added by Mr. Forsyth, are those relating to vice-admiralty jurisdiction and piracy; the prerogatives of the Crown in relation to treasure trove, land in the colonies, mines, cession of territory, &c.; the power of courts-martial, extra-territorial jurisdiction, alle-

giance, the *lex loci* and the *lex fori*, extradition, and appeals from the colonies. The volume bears marks of extreme care and regard to accuracy, and is in every respect a valuable contribution to constitutional law."

## From the LAW TIMES.

"This one volume of 560 pages or thereabouts is a perfect storehouse of law not readily to be found elsewhere, and the more useful because it is not abstract law, but the application of principles to particular cases. Mr. Forsyth's plan is that of classification. He collects in separate chapters a variety of opinions bearing upon separate branches of the law. Thus, the first chapter is devoted to cases on the common law, and the law applicable to the colonies; the second to the ecclesiastical law relating to the colonies; the third to the powers and duties, civil and criminal liabilities, of governors of colonies; the next to vice-admiralty jurisdiction and piracy; the fifth to certain prerogatives of the Crown: such as lands in the colonies, grants, escheats, mines, treasure trove, royal fish, felon's goods, writ *ne exeat regno*, proclamation, cession of territory, and creation of courts of justice; the sixth chapter contains opinions on martial law and courts-martial; the seventh on extra-territorial jurisdiction; the eighth on the *lex loci* and *lex fori*; the ninth on allegiance and aliens; and then successively on extradition; on appeals from the colonies; on the revocation of charters; on the Channel Islands; on the nationality of a ship, and other matters relating to ships; on the power of the Crown to grant exclusive rights of trade; on writs of habeas corpus; on certain points relating to the criminal law; and lastly, on miscellaneous subjects, such as the declaration of war before hostilities; on the right of war, booty and prize, and on the grant of a marriage licence. . . . This is a book to be read, and therefore we recommend it not to all lawyers only, but to every law student. The editor's own notes are not the least valuable portion of the volume."

# THE REVISED EDITION OF THE STATUTES,

PREPARED UNDER THE DIRECTION OF THE STATUTE LAW COMMITTEE, AND

PUBLISHED BY THE AUTHORITY OF HER MAJESTY'S GOVERNMENT.

Volume 1.—Henry III. to James II.,	1235–1685	£1 1 0 cloth.
" 2.—Will. & Mary to 10 Geo. III.,	1688–1770	" 1 0 0 "
" 3.—11 Geo. III. to 41 Geo. III.,	1700–1800	" 0 17 0 "
" 4.—41 Geo. III. to 51 Geo. III.,	1801–1811	" 0 18 0 "
" 5.—52 Geo. III. to 4 Geo. IV.,	1812–1823	" 1 5 0 "
" 6.—5 Geo. IV. to 1 & 2 Will. IV.,	1824–1831	" 1 6 0 "
" 7.—2 & 3 Will. IV. to 6 & 7 Will. IV.,	1831–1836	" 1 10 0 "
" 8.—7 Will. IV. & 1 Vict. to 5 & 6 Vict.,	1837–1842	" 1 12 6 "
" 9.—6 & 7 Vict. to 9 & 10 Vict.,	1843–1846	" 1 11 6 "
" 10.—10 & 11 Vict. to 13 & 14 Vict.,	1847–1850	" 1 7 6 "
" 11.—14 & 15 Vict. to 16 & 17 Vict.,	1851–1853	" 1 4 0 "
" 12.—17 & 18 Vict. to 19 & 20 Vict.,	1854–1856	" 1 6 0 "
" 13.—20 Vict. to 24 & 25 Vict.,	1857–1861	" 1 10 0 "
" 14.—25 & 26 Vict. to 28 & 29 Vict.,	1862–1865	" 1 10 0 "
" 15.—29 & 30 Vict. to 31 & 32 Vict.,	1866–1867–8	" 1 10 6 "

\*. \* The Fifteenth Volume Completes the Edition of the REVISED STATUTES.

CHRONOLOGICAL TABLE of and INDEX to the STATUTES, to the end of the Session of 1878. Fifth Edition, imperial 8vo., 14s., cloth.

In 8vo., 1877, price 25s., cloth,

# THE LAW OF COMPENSATION FOR LANDS, HOUSES, &c.,

Under the Lands Clauses, Railways Clauses Consolidation and Metropolitan Acts,  
THE ARTIZANS & LABORERS' DWELLINGS IMPROVEMENT ACT, 1875.  
WITH A FULL COLLECTION OF FORMS AND PRECEDENTS,

**Fourth Edition,**

*Much enlarged, with many additional Forms, including Precedents of Bills of Costs.*

By EYRE LLOYD, OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"A fourth edition of Mr. Lloyd's valuable treatise has just been published. Few branches of the law affect so many and such important interests as that which gives to private individuals compensation for property compulsorily taken for the purpose of public improvements. The questions which arise under the different Acts of Parliament now in force are very numerous and difficult, and a collection of decided cases epitomised and well arranged, as they are in Mr. Lloyd's work, cannot fail to be a welcome addition to the library of all who are interested in landed property, whether as owners, land agents, public officers or solicitors."—MIDLAND COUNTIES HERALD.

"It is with much gratification that we have to express our unhesitating opinion that Mr. Lloyd's treatise will prove thoroughly satisfactory to the profession, and to the public at large. Thoroughly

satisfactory it appears to us in every point of view—comprehensive in its scope, exhaustive in its treatment, sound in its exposition."—*Irish Law Times.*

"In providing the legal profession with a book which contains the decisions of the Courts of Law and Equity upon the various statutes relating to the Law of Compensation, Mr. Eyre Lloyd has long since left all competitors in the distance, and his book may now be considered the standard work upon the subject. The plan of Mr. Lloyd's book is generally known, and its lucidity is appreciated; the present quite fulfils all the promises of the preceding editions, and contains in addition to other matter a complete set of forms under the Artizans and Labourers Act, 1875, and specimens of Bills of Costs, which will be found a novel feature, extremely useful to legal practitioners."—JUSTICE OF THE PEACE.

"The work is one of great value. It deals with a complicated and difficult branch of the law, and it deals with it exhaustively. It is not merely a compilation or collection of the statutes bearing on the subject, with occasional notes and references. Rather it may be described as a comprehensive treatise on, and digest of, the law relating to the compulsory acquisition and purchase of land by public companies and municipal and other local authorities, and the different modes of assessment

of the compensation. All the statutes bearing on the subject have been collated, all the law on the subject collected, and the decisions conveniently arranged. With this comprehensiveness of scope is united a clear statement of principles, and practical handling of the points which are likely to be contested, and especially of those in which the decisions are opposed or differently understood."—*Local Government Chronicle.*

In 8vo., 1877, price 7s., cloth,

# THE SUCCESSION LAWS OF CHRISTIAN COUNTRIES,

WITH SPECIAL REFERENCE TO

THE LAW OF PRIMOGENITURE AS IT EXISTS  
IN ENGLAND.

By EYRE LLOYD, B.A.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

*Author of "The Law of Compensation under the Lands Clauses Consolidation Acts," &c.*

"Mr. Lloyd has given us a very useful and compendious little digest of the laws of succession which exist at the present day in the principal States of both Europe and America; and we should say it is a book which not only every lawyer, but every politician and statesman, would do well to add to his library."—*Pall Mall Gazette.*

"Mr. Eyre Lloyd compresses into little more than eighty pages a considerable amount of matter both valuable and interesting; and his quotations from Diplomatic Reports by the present Lord Lytton, and other distinguished public servants, throw a picturesque light on a narrative much of which is necessarily dry reading. We can confidently recommend Mr. Eyre Lloyd's new work as one of great practical utility, if, indeed, it be not unique in our language, as a book of reference on Foreign Succession Laws."—*Law Magazine and Review.*

"Mr. Eyre Lloyd has composed a useful and interesting abstract of the laws on the subject of succession to property in Christian countries, with especial reference to the law of primogeniture in England."—*Saturday Review.*

"This is a very useful little handy book on foreign succession laws. It contains in an epitomised form information which would have to be sought for through a great number of scattered authorities and foreign law treatises, and will be found of great value to the lawyer, the writer, and the political student."—*Standard.*

In one thick volume, 8vo., 1869, price 32s., cloth,

## THE LAW OF RAILWAY COMPANIES.

Comprising the Companies Clauses, the Lands Clauses, the Railways Clauses Consolidation Acts, the Railway Companies Act, 1867, and the Regulation of Railways Act, 1868; with Notes of Cases on all the Sections, brought down to the end of the year 1868; together with an Appendix giving all the other material Acts relating to Railways, and the Standing Orders of the Houses of Lords and Commons; and a copious Index. By HENRY GODEFROI, of Lincoln's Inn, and JOHN SHORTT, of the Middle Temple, Barristers-at-Law.

"The title of this book is the best possible explanation of its contents. Here we have all the statutes affecting Railway Companies, with the standing orders of Parliament, in a volume exquisitely printed, and of most convenient size and form. We have also, what in effect to the practitioner is a complete manual of reference of all the decided cases on Railway Law, together with an index of so copious and accurate a nature, as to render the discovery of every section and every authority easy in the highest degree. . . . We find pages of authorities on 'transfer of shares,' 'calls,' 'forfeiture of shares,' '*sci. fa.*,' 'Lloyd's bonds,' 'contracts by companies,' and 'dividends.' Then

comes a mass of matter relating to the voluntary and compulsory acquisition of lands by Railway Companies, while the 'compensation' cases stretch over some fifty pages. So also under the third statute, there are a dozen pages on the powers and duties of Railway Companies in the construction of their works, while the liability of the Companies as carriers of passengers and goods is also elucidated in the most elaborate style. The 'Rating of Railways' adds several pages of authorities. . . . We believe that we have said enough to show that this book will prove to be of pre-eminent value to practitioners, both before Parliamentary committees and in the Courts of Law and Equity."—*Law Journal*.

In 8vo., price 2s. 6d.,

## MORIARTY ON PERSONATION AND DISPUTED IDENTITY AND THEIR TESTS.

In a handy volume, crown 8vo., 1870, price 10s. 6d., cloth,

## THE LAW OF SALVAGE,

As administered in the High Court of Admiralty and the County Courts; with the Principal Authorities, English and American, brought down to the present time; and an Appendix, containing Statutes, Forms, Table of Fees, etc. By EDWYN JONES, of Gray's Inn, Barrister-at-Law.

"This book will be of infinite service to lawyers practising in the maritime law courts and to those engaged in shipping. In short, Mr. Jones's book is a complete guide, and is full of information upon all phases of the subject, tersely and clearly written. It will be quite as useful to, as it is as much needed by, the American lawyer as the English, because the salvage laws of America and England are much alike, and Mr. Jones makes constant reference to American authorities. The book is all the more welcome because the subject upon which it treats is but little understood except by a favoured few. Now, however, if interested people remain ignorant it is their own fault. Mr. Jones has treated a very complicated and difficult subject in a simple and concise manner, and his success is commensurate with

his simplicity of style."—*Liverpool Journal of Commerce*.

"An admirable treatise on an important branch of jurisprudence is compiled by Mr. Edwyn Jones, of Gray's Inn, Barrister-at-Law, who, in a compact volume, gives us a very comprehensive statement of 'The Law of Salvage,' as administered in the High Court of Admiralty and the County Courts; with the principal authorities, English and American, brought down to the present time, and an Appendix containing statutes, forms, tables of fees, &c. Mr. Jones has consulted a wide range of cases, and systematised with much skill and clearness the leading principles deducible from numerous judgments and precedents, both here and in the United States. His work is likely to become a text-book on the law in question."—*Daily News*.

In 8vo., 1867, price 1s., sewed,

## LLOYD'S BONDS; THEIR NATURE AND USES.

By HENRY JEFFERD TARKANT, of the Middle Temple, Barrister-at-Law.

*In Octavo, 1879, price 10s., cloth,***THE PRINCIPLES OF BANKRUPTCY.****WITH AN APPENDIX,**

CONTAINING

**THE GENERAL RULES of 1870, 1871, 1873, and 1878,  
Scale of Costs, and the Bills of Sale Act, 1878.**

BY

**RICHARD RINGWOOD, B.A.,***Of the Middle Temple, Esq., Barrister-at-Law; late Scholar of Trinity College, Dublin.*

"The author of this convenient handbook sees the point upon which we insist elsewhere in regard to the chief aim of any system of Bankruptcy Law which should deserve the title of National. . . . There can be no question that a sound measure of Reform is greatly needed, and would be welcomed by all parties in the United Kingdom. Pending this amendment it is necessary to know the Law as it is, and those who have to deal with the subject in any of its practical legal aspects will do well to consult Mr. Ringwood's unpretending but useful volume."—*Law Magazine*.

"Mr. Ringwood tells us in his preface that his work is chiefly intended for students, and it will no doubt be useful to them. On the other hand, the 'principles of bankruptcy' are not dealt with by Mr. Ringwood in the way we expected from the title of his book, which is, in fact, the Bankruptcy Act of 1869 itself arranged—no doubt at considerable labour—in about the most convenient form in which it can be presented to the student. The Table of Cases is carefully prepared, reference being made in each case to all the contemporary law reports. Mr. Ringwood has fairly and concisely stated the new and the old law as to bills of sale, and as to the rights of trustees in bankruptcy in connection therewith."—*Law Times*.

"The above work is written by a distinguished scholar of Trinity College, Dublin. Mr. Ringwood has chosen a most difficult and unattractive subject, but he has shown sound judgment and skill in the manner in which he has executed his task. His book does not profess to be an exhaustive treatise on bankruptcy law, yet in a neat and compact volume we have a vast amount of well-digested matter. The reader is not distracted and puzzled by having a long list of cases flung at him at the end of each page, as the general effect of the law is stated in a few well-selected sentences, and a reference given to the leading decisions only on the subject. . . . An excellent index, and a table of cases, where references to four sets of contemporary reports may be seen at a glance, show the industry and care with which the work has been done."—*Daily Paper*.

*Just published, in royal 12mo., price 14s., cloth,*

A

**CONCISE TREATISE**

UPON

**THE LAW OF BANKRUPTCY.****WITH AN APPENDIX,**

CONTAINING

**THE BANKRUPTCY ACT, 1869; GENERAL RULES OF 1870,  
1871, 1873, AND 1878;****Forms of 1870 and 1871; Scale of Costs; the Debtors Act, 1869;  
Debtors Act, 1878; and Bills of Sale Act, 1878.**

BY

**EDWARD T. BALDWIN, M.A.,***Of the Inner Temple, Barrister-at-Law.*

## THE LAW OF CORPORATIONS.

In one volume of One Thousand Pages, royal 8vo., 1877, price 42s., cloth,

A TREATISE ON THE DOCTRINE OF

# ULTRA VIRES:

BRING

An Investigation of the Principles which Limit the Capacities, Powers, and Liabilities of

## Corporations,

AND MORE ESPECIALLY OF

## JOINT STOCK COMPANIES.

SECOND EDITION.

By SEWARD BRICE, M.A., LL.D., LONDON,  
Of the Inner Temple, Barrister-at-Law.

### REVIEWS.

"Despite its unpromising and cabalistic title, and the technical nature of its subject, it has so recommended itself to the profession that a second edition is called for within three years from the first publication; and to this call Mr. Brice has responded with the present volume, the development of which in excess of its predecessor is remarkable even in the annals of law books. Sixteen hundred new cases have been introduced, and, instead of five hundred pages octavo, the treatise now occupies a thousand and very much larger pages. This increase in bulk is partly due to the incorporation with the English law on the subject of the more important American and Colonial doctrines and decisions—a course which we think Mr. Brice wise in adopting, since the judgments of American tribunals are constantly becoming more frequently quoted and more respectfully considered in our own courts, particularly on those novel and abstruse points of law for which it is difficult to find direct authority in English reports. In the present speculative times, anything relating to Joint-Stock Companies is of public importance, and the points on which the constitution and operation of these bodies are affected by the doctrine of *Ultra Vires* are just those which are most material to the interests of the shareholders and of the community at large. . . . Some of the much disputed questions in regard to corporations, on which legal opinion is still divided, are particularly well treated. Thus with reference to the authority claimed by the Courts to restrain corporations or individuals from applying to Parliament for fresh powers in breach of their express agreements or in derogation of private rights, Mr. Brice most elaborately and ably reviews the conflicting decisions on this apparent interference with the rights of the subject, which threatened at one time to bring the Legislature and the Courts into a collision similar to that which followed on the well-known case of *Ashby v. White*. . . . Another very difficult point on which Mr. Brice's book affords full and valuable information is as to the liability of Companies on contracts entered into before their formation by the promoters, and subsequently ratified or adopted by the Company, and as to the claims of promoters themselves for services rendered to the inchoate Company. . . . The chapter on the liabilities of corporations *ex delicto* for fraud and other torts committed by their agents within the region of their authority seems to us remarkably well done, reviewing as it does all the latest and somewhat contradictory decisions on the point. . . . On the whole, we consider Mr. Brice's exhaustive work a valuable addition to the literature of the profession.—SATURDAY REVIEW.

"The doctrine which forms the subject of Mr. Seward Brice's elaborate and exhaustive work is a remarkable instance of rapid growth in modern Jurisprudence. His book, indeed, now almost constitutes a Digest of the Law of Great Britain and her Colonies and of the United States on the Law of Corporations—a subject vast enough at home, but even more so beyond the Atlantic, where Corporations are so numerous and so powerful. Mr. Seward Brice relates that he has embodied a reference in the present edition to about 1600 new cases, and expresses the hope that he has at least referred to 'the chief cases.' We should think there can be few, even of the Foreign Judgments and Dicta, which have not found their way into his pages. The question what is and what is not *Ultra Vires* is one of very great importance in commercial countries like Great Britain and the United States. Mr. Seward Brice has done a great service to the cause of Comparative Jurisprudence by his new recension of what was from the first a unique text-

book on the Law of Corporations. He has gone far towards effecting a Digest of that Law in its relation to the Doctrine of *Ultra Vires*, and the second edition of his most careful and comprehensive work may be commended with equal confidence to the English, the American, and the Colonial Practitioner, as well as to the Scientific Jurist."—*Law Magazine and Review*.

"It is the law of Corporations that Mr. Brice treats of (and treats of more fully, and at the same time more scientifically, than any work with which we are acquainted) not the law of principal and agent; and Mr. Brice does not do his book justice by giving it so vague a title."—*Law Journal*.

"A guide of very great value. Much information on a difficult and unattractive subject has been collected and arranged in a manner which will be of great assistance to the seeker after the law on a point involving the powers of a company."—*Law Journal*. (Review of First Edition.)

"On this doctrine, first introduced in the Common Law Courts in *East Anglian Railway Co. v. Eastern Counties Railway Co.* BRICE ON *ULTRA VIRES* may be read with advantage."—*Judgment of LORD JUSTICE BRAMWELL in the Case of Evershed v. L. & N. W. Ry. Co.* (L. R., 3 Q. B. Div. 141.)

Just published, Third Edition, in royal 8vo., 1879, price 32s., cloth,

# THE LAW AND PRACTICE UNDER THE COMPANIES ACTS

1862, 1867, 1870, and 1877;

AND

## THE LIFE ASSURANCE COMPANIES ACTS,

1870 to 1872.

Containing the Statutes, with the Rules, Orders, and Forms regulating Proceedings in the Chancery Division of the High Court of Justice, and full Notes of the Decisions, &c., &c. By H. BURTON BUCKLEY, M.A., of Lincoln's Inn, Barrister-at-Law, and Fellow of Christ's College, Cambridge.

\* \* \* *This work forms a complete Treatise on the Law relating to Joint Stock Companies.*

"The mere arrangement of the leading cases under the successive sections of the acts, and the short explanation of their effect, are of great use in saving much valuable time, which would be otherwise spent in searching the different digests; but the careful manner in which Mr. Buckley has annotated the acts, and placed the cases referred to under distinct headings, renders his work particularly useful to all who are required to advise in the complications in which the shareholders and creditors of companies frequently find themselves involved. . . . The Index, always an important part of a law book, is full and well arranged."—*Scottish Journal of Jurisprudence.*

In two volumes, royal 8vo., 1875, price 70s., cloth,

# THE LAW

RELATING TO

## SHIPMASTERS AND SEAMEN.

*THEIR APPOINTMENT, DUTIES, POWERS, RIGHTS,  
LIABILITIES AND REMEDIES.*

By JOSEPH KAY, Esq., M.A., Q.C.,

OF TRIN. COLL. CAMBRIDGE, AND OF THE NORTHERN CIRCUIT;  
SOLICITOR-GENERAL OF THE COUNTY PALATINE OF DURHAM; ONE OF THE JUDGES OF THE COURT OF  
RECORD FOR THE HUNDRED OF SALFORD;  
AND AUTHOR OF "THE SOCIAL CONDITION AND EDUCATION OF THE PEOPLE  
IN ENGLAND AND EUROPE."

## REVIEWS OF THE WORK.

From the NAUTICAL MAGAZINE, July, 1875.

"It is rarely that we find a book fulfilling the requirements of both classes; full and precise enough for the lawyer, and at the same time intelligible to the non-legal understanding. Yet the two volumes by Mr. Kay on the law relating to shipmasters and seamen will, we venture to say, be of equal service to the captain, the lawyer, and the Consul, in their respective capacities, and even of

interest to the public generally, written as it is in a clear and interesting style, and treating of a subject of such vast importance as the rights and liabilities and relative duties of all, passengers included, who venture upon the ocean; more than that, we think that any able-seaman might read that chapter on the crew with the certainty of acquiring a clearer notion of his own position on board ship.

# THE LAW RELATING TO SHIPMASTERS AND SEAMEN.

## REVIEWS OF THE WORK—continued.

"We can make no charge of redundancy or omission against our author; but if we were called upon to select any one out of the fifteen parts into which the two volumes are divided as being especially valuable, we should not hesitate to choose that numbered three, and entitled 'The Voyage.' There the master will find a succinct and compendious statement of the law respecting his duties, general and particular, with regard to the ship and its freight from the moment when, on taking command, he is bound to look to the seaworthiness of the ship, and to the delivery of her log at the final port of destination. In Part IV. his duties are considered with respect to the cargo, this being a distinct side of his duplicate character, inasmuch as he is agent of the owner of the cargo just as much as the owner of the ship.

"Next in order of position come 'Bills of Lading' and 'Stoppage in Transitu.' We confess that on first perusal we were somewhat surprised to find the

subject of the delivery of goods by the master given priority over that of bills of lading; the logical sequence, however, of these matters was evidently sacrificed, and we think with advantage to the author's desire for unity in his above-mentioned chapters on 'The Voyage.' That this is so is evidenced by the fact that after his seventh chapter on the latter subject he has left a blank chapter with the heading of the former and a reference *ante*. 'The power of the master to bind the owner by his personal contracts,' 'Hypothecation,' and 'The Crew,' form the remainder of the contents of the first volume, of which we should be glad to have made more mention, but it is obviously impossible to criticize in detail a work in which the bare list of cited cases occupies forty-four pages.

"The question of compulsory pilotage is full of difficulties, which are well summed up by Mr. Kay.

"In conclusion, we can heartily congratulate Mr. Kay upon his success."

## From the LIVERPOOL JOURNAL OF COMMERCE.

"The Law relating to Shipmasters and Seamen"—such is the title of a voluminous and important work which has just been issued by Messrs. Stevens and Haynes, the eminent law publishers, of London. The author is Mr. Joseph Kay, Q.C., and while treating generally of the law relating to shipmasters and seamen, he refers more particularly to their appointment, duties, rights, liabilities, and remedies. It consists of two large volumes, the text occupying nearly twelve hundred pages, and the value of the

work being enhanced by copious appendices and index, and by the quotation of a mass of authorities. . . . *The work must be an invaluable one to the shipowner, shipmaster, or consul at a foreign port.* The language is clear and simple, while the legal standing of the author is a sufficient guarantee that he writes with the requisite authority, and that the cases quoted by him are decisive as regards the points on which he touches."

## From the LAW JOURNAL.

"The author tells us that for ten years he has been engaged upon it. . . . Two large volumes containing 1181 pages of text, 81 pages of appendices, 98 pages of index, and upwards of 1800 cited cases, attest the magnitude of the work designed and accomplished by Mr. Kay.

"Mr. Kay says that he has 'endeavoured to

compile a guide and reference book for masters, ship agents, and consuls.' He has been so modest as not to add lawyers to the list of his pupils; but *his work will, we think, be welcomed by lawyers who have to do with shipping transactions, almost as cordially as it undoubtedly will be by those who occupy their business in the great waters.*"

In crown 12mo., 1876, price 12s., cloth,

## A TREATISE

ON THE

## LOCUS STANDI OF PETITIONERS AGAINST PRIVATE BILLS IN PARLIAMENT.

## THIRD EDITION.

By JAMES MELLOR SMETHURST, Esq., of Trinity College, Cambridge, M.A., and of the Inner Temple, Barrister-at-Law.

2 vols. 4to., 1876-77. 5l. 5s., calf.

THE

## PRACTICAL STATUTES OF NEW ZEALAND.

WITH NOTES AND INDEX.

Edited by G. B. BARTON, of the Middle Temple, Barrister-at-Law.

## THE NEW ZEALAND JURIST (NEW SERIES).

JOURNAL AND LAW REPORTS. PUBLISHED MONTHLY.

Edited by G. B. BARTON, Barrister-at-Law, Dunedin, New Zealand.

The Reports include all cases of importance argued and determined in the Court of Appeal of New Zealand, and in the Supreme Court in its various Districts.

THE NEW ZEALAND JURIST is the only Legal Journal published in New Zealand.

Orders for the "JURIST" will be received by

STEVENS & HAYNES, BELL YARD, TEMPLE BAR, LONDON.



In one thick volume, 8vo., 1875, price 25s., cloth,

## THE PRINCIPLES OF THE LAW OF RATING of HEREDITAMENTS in the OCCUPATION of COMPANIES.

By J. H. BALFOUR BROWNE,

*Of the Middle Temple, Barrister-at-Law; Registrar to the Railway Commissioners.*

"The tables and specimen valuations which are printed in an appendix to this volume, will be of great service to the parish authorities, and to the legal practitioners who may have to deal with the rating of those properties which are in the occupation of Companies, and we congratulate Mr. Browne on the production of a clear and concise book of the system of Company Rating. There is no doubt

that such a work is much needed, and we are sure that all those who are interested in, or have to do with public rating, will find it of great service. Much credit is therefore due to Mr. Browne for his able treatise—a work which his experience as Registrar of the Railway Commission peculiarly qualified him to undertake."—*Law Magazine*.

In 8vo., 1875, price 7s. 6d., cloth,

## THE LAW OF USAGES and CUSTOMS: A Practical Law Tract.

By J. H. BALFOUR BROWNE,

*Of the Middle Temple, Barrister-at-Law; Registrar to the Railway Commissioners.*

"We look upon this treatise as a valuable addition to works written on the Science of Law."—*Canada Law Journal*.

"As a tract upon a very troublesome department of Law it is admirable—the principles laid down are sound, the illustrations are well chosen, and the decisions and *dicta* are harmonised so far as possible, and distinguished when necessary."—*Irish Law Times*.

"As a book of reference we know of none so comprehensive dealing with this particular branch of Common Law. . . . In this way the book is invaluable to the practitioner."—*Law Magazine*.

In one volume, 8vo., 1875, price 18s., cloth,

## THE PRACTICE BEFORE THE RAILWAY COMMISSIONERS UNDER THE REGULATION OF RAILWAYS ACTS, 1873 and 1874;

With the Amended General Orders of the Commissioners, Schedule of Forms, and Table of Fees: together with the Law of Undue Preference, the Law of the Jurisdiction of the Railway Commissioners, Notes of their Decisions and Orders, Precedents of Forms of Applications, Answers and Replies; and Appendices of Statutes and Cases.

By J. H. BALFOUR BROWNE,

*Of the Middle Temple, Barrister-at-Law, and Registrar to the Railway Commissioners.*

"Mr. Browne's book is handy and convenient in form, and well arranged for the purposes of reference; its treatment of the subject is fully and carefully worked out: it is, so far as we have been able to test it, accurate and trustworthy. It is the

work of a man of capable legal attainments, and by official position intimate with his subject; and we therefore think that it cannot fail to meet a real want and to prove of service to the legal profession and the public."—*Law Magazine*.

In 8vo., 1876, price 7s. 6d., cloth,

## ON THE COMPULSORY PURCHASE of the UNDERTAKINGS OF COMPANIES BY CORPORATIONS,

And the Practice in Relation to the Passage of Bills for Compulsory Purchase through Parliament. By J. H. BALFOUR BROWNE, of the Middle Temple, Barrister-at-Law; Author of "The Law of Rating," "The Law of Usages and Customs," &c., &c.

"This is a work of considerable importance to all Municipal Corporations, and it is hardly too much to say that every member of these bodies should have a copy by him for constant reference. Probably at no very distant date the property of all the existing gas and water companies will pass under municipal control, and therefore it is exceedingly desirable that the principles and conditions under which such transfers ought to be made should be clearly understood. This task is made easy by the present volume. The stimulus for the publication of such a work was given by the action of the Parliamentary Committee which last Session passed the preamble of the 'Stockton and Middlesbrough Corporations Water Bill, 1876.' The volume accordingly contains a full report of the case as it was presented

both by the promoters and opponents, and as this was the first time in which the principle of compulsory purchase was definitely recognised, there can be no doubt that it will long be regarded as a leading case. As a matter of course, many incidental points of interest arose during the progress of the case. Thus, besides the main question of compulsory purchase, and the question as to whether there was or was not any precedent for the Bill, the questions of water compensations, of appeals from one Committee to another, and other kindred subjects were discussed. These are all treated at length by the Author in the body of the work, which is thus a complete legal compendium on the large subject with which it so ably deals."

Now ready, in 8vo., 1878, price 6s., cloth,

# THE LAW RELATING TO CHARITIES,

Especially with Reference to the Validity and Construction of

## CHARITABLE BEQUESTS AND CONVEYANCES.

BY

FERDINAND M. WHITEFORD, of Lincoln's Inn, Barrister-at-Law.

"The Law relating to Charities by F. M. Whiteford, contains a brief but clear exposition of the law relating to a class of bequests in which the intentions of donors are often frustrated by unacquaintance with the Statutory provisions on the subject. Decisions in reported Cases occupy a

large portion of the text, together with the explanations pertinent to them. The general tenor of Mr. Whiteford's work is that of a digest of Cases rather than a treatise, a feature, however, which will not diminish its usefulness for purposes of reference."—*Law Magazine and Review*.

In 8vo., 1872, price 7s. 6d., cloth,

# AN EPITOME AND ANALYSIS

OF

## SAVIGNY'S TREATISE ON OBLIGATIONS IN ROMAN LAW.

By ARCHIBALD BROWN, M.A.

Edin. and Oxon. and B.C.L. Oxon., of the Middle Temple, Barrister-at-Law.

"Mr. Archibald Brown deserves the thanks of all interested in the science of law, whether as a study or a practice, for his edition of Herr von Savigny's great work on 'Obligations.' Mr. Brown has undertaken a double task—the translation of his author, and the analysis of his author's matter. That he has succeeded in reducing the bulk of the original will be seen at a glance; the French translation consisting of two volumes, with some five hundred pages apiece, as compared with Mr. Brown's thin volume of a hundred and

fifty pages. At the same time the pith of Von Savigny's matter seems to be very successfully preserved, nothing which might be useful to the English reader being apparently omitted.

"The new edition of Savigny will, we hope, be extensively read and referred to by English lawyers. If it is not, it will not be the fault of the translator and epitomiser. Far less will it be the fault of Savigny himself, whose clear definitions and accurate tests are of great use to the legal practitioner."—*Law Journal*.

# THE ELEMENTS OF ROMAN LAW.

In 216 pages 8vo., 1875, price 10s., cloth,

# A CONCISE DIGEST OF THE INSTITUTES

OF

## GAIUS AND JUSTINIAN,

*With copious References arranged in Parallel Columns, also Chronological and Analytical Tables, Lists of Laws, &c. &c.*

Primarily designed for the Use of Students preparing for Examination at Oxford, Cambridge, and the Inns of Court.

By SEYMOUR F. HARRIS, B.C.L., M.A.,

OF WORCESTER COLLEGE, OXFORD, AND THE INNER TEMPLE, BARRISTER-AT-LAW;  
AUTHOR OF "UNIVERSITIES AND LEGAL EDUCATION."

"Mr. Harris's digest ought to have very great success among law students both in the Inns of Court and the Universities. His book gives evidence of praiseworthy accuracy and laborious condensation."—*LAW JOURNAL*.

"This book contains a summary in English of the elements of Roman Law as contained in the works of Gaius and Justinian, and is so arranged that the reader can at once see what are the opinions of either of these two writers on each point. From the very exact and accurate references to titles and sections given he can at once refer to the original writers. The concise manner in which Mr. Harris has arranged his digest will render it most useful, not only to the students for whom it was originally written, but also to those persons who, though they have not the time to wade through the larger treatises of Poste, Sanders, Orlolan, and others, yet desire to obtain some knowledge of Roman Law."—*OXFORD AND CAMBRIDGE UNDERGRADUATES' JOURNAL*.

"Mr. Harris deserves the credit of having produced an epitome which will be of service to those numerous students who have no time or sufficient ability to analyse the *Institutes* for themselves."—*LAW TIMES*.

For the Preliminary Examinations before Entering into Articles of Clerkship to Solicitors under the Solicitors Act, 1877.

Now ready, in a handsome 4to. volume, with Map of the World, price 10s., cloth,

## **THE STUDENTS' REMINDER AND PUPILS' HELP IN PREPARING FOR A PUBLIC EXAMINATION.**

By THOMAS MARSH,

Private Tutor, Author of an "English Grammar," &c.

"In these days of competitive examination and well-nigh universal education, students will find a useful auxiliary in the 'Student's Reminder and Pupil's Help,' by Thomas Marsh, which gives in a concise form some fruitful information, that, just because it is elementary, is apt to be momentarily forgotten."—*The Graphic*.

"We welcome this compendium with great pleasure as being exactly what is wanted in this age of competitive examinations. It is evidently the work of a master hand, and could only be compiled by one thoroughly experienced in the work of teaching. Mr. Marsh has summarised and analysed the subjects required for the preliminary examinations of law students, as well as for the University and Civil Service examinations. He has paid special attention to mathematics, but the compendium also includes ancient and modern languages, geography, dictation, &c. It was a happy idea to make it quarto size, and the type and printing are clear and legible."—*Irish Law Times*.

"This remarkable volume might almost be described as containing a little of everything, and any student who masters its contents may fairly regard himself as standing well for such ordinary examinations as he may be called upon to pass. Mr. Marsh has evidently had great experience in preparing pupils for such tests, and he has in this work brought together a mass of leading points on a variety of subjects for their assistance."—*City Press*.

Now ready, Second Edition, in 8vo., price 21s., cloth,

## **ENGLISH CONSTITUTIONAL HISTORY.**

*From the Teutonic Invasion to the Present Time.*

*Designed as a Text-Book for Students and Others.*

BY

**T. P. TASWELL-LANGMEAD, B.C.L.,**

Of Lincoln's Inn, Barrister-at-Law, late Vinerian Scholar in the University of Oxford, and Tancred Student in Common Law.

Second and Enlarged Edition, revised throughout, and in many parts rewritten.

*Extracts from some Reviews of the First Edition.*

"We think Mr. Taswell-Langmead may be congratulated upon having compiled an elementary work of conspicuous merit."—*Pall Mall Gazette*.

"It bears marks of great industry on the part of the compiler, and is most completely stocked with all the important facts in the Constitutional History of England, which are detailed with much conciseness and accuracy, . . . and is very full and clear."—*Spectator*.

"For students of history we do not know any work which we could more thoroughly recommend."—*Law Times*.

"It is a safe, careful, praiseworthy digest and manual of all constitutional history and law."—*Globe*.

"For conciseness, comprehensiveness, and clearness, we do not know of a better modern book than Mr. Taswell Langmead's 'English Constitutional History.'"—*Notes and Queries*.

"The volume on English Constitutional History, by Mr. Taswell-Langmead, is exactly what such a history should be."—*Standard*.

"As a text-book for students, we regard it as an exceptionally able and complete work."—*Law Journal*.

"Mr. Taswell-Langmead has endeavoured in the present volume to bring together all the most prominent features in the Constitutional History of England, and explain their origin and development. It is possible to gain from a hundred pages of Mr. Langmead's work a knowledge of the growth and progress of the present system, which elsewhere could only be obtained in many volumes."—*Irish Law Times*.

"Mr. Taswell-Langmead has thoroughly grasped the bearings of his subject. It is, however, in dealing with that chief subject of constitutional history—parliamentary government—that the work exhibits its great superiority over its rivals."—*Academy*.

Fifth Edition, in 8vo., 1880, price 25s., cloth,

# THE PRINCIPLES OF EQUITY.

Intended for the Use of Students and the Profession.

By EDMUND H. T. SNELL, of the Middle Temple, Barrister-at-Law.

FIFTH EDITION.

TO WHICH IS ADDED  
AN EPITOME OF THE EQUITY PRACTICE.

SECOND EDITION.

By ARCHIBALD BROWN, M.A. Edin. and Oxon., and B.C.L. Oxon., of the Middle Temple, Barrister-at-Law ; Author of "A New Law Dictionary," "An Analysis of Savigny on Obligations," and the "Law of Fixtures."

## REVIEWS.

"The changes introduced by the Judicature Acts have been well and fully explained by the present edition of Mr. Snell's treatise, and everything necessary in the way of revision has been conscientiously accomplished. We perceive the fruitful impress of the 'amending hand' in every page; the results of the decisions under the new system have been carefully explained, and engrafted into the original text; and in a word, Snell's work, as edited by Mr. Brown, has proved the fallacy of Bentham's description of Equity as 'that capricious and inconsistent mistress of our fortunes, whose features no one is able to delineate.' He has added a book, comprising 127 pages, on the present 'Practice in Equity,' as to which he observes that it 'will be probably found by students very serviceable, and by practitioners very handy and convenient, seeing that it embodies the whole procedure (even in its minutest details), and at the same time collects it all together under efficient practical headings, with their sub-divisions, so much so that everything may be found in the 'Practice' without either difficulty of search or diversity of reference.' This, on the whole, accurately describes the general character and quality of that portion of the work; but at the same time, we must say that it cannot well claim to be much more than a *skilful précis of the procedure as formulated and prescribed by the Acts and Rules themselves*, with a few exceptions, but without anything like an expanded treatment such as might render that portion of the work equal to the portion dealing with the principles of equity. Suggested, however, by the necessities experienced by its writer in his own practice, it will doubtless prove useful to others in an equal degree; and it certainly forms a valuable and much-needed supplement to Mr. Snell's work."—*Irish Law Times*.

"Snell's Equity,' as this work is so familiarly called, is a work which is probably known to students of the law in all countries where the English language is spoken, and, as a matter of fact, no one who attempts the study of Equity, can obtain a really proper insight into the science without a perusal, sooner or later, of this book. In 1858 the 'Principles of Equity' appeared for the first time. Ever since that date it has been the standard work on the subject. The Edition before us is the fourth that has appeared, and from the many additions and improvements that are embodied in it, it will, we are convinced, quite equal, if not increase, its hitherto well-deserved popularity. The present edition, unlike former ones, is divided into two Books. The first Book consists of the original 'Principles' in form and style similar to the edition first published by Mr. Snell, with the exception that some paragraphs have been entirely re-written and additions made to it, so as to bring it more in consonance with the existing state of the law. In its general character this part of the work is not much altered from former editions, as the many minor errors and deficiencies have been corrected, while the language used, and the contents of the book generally, have been worked up to the level of the new procedure introduced by the sweeping and important legislation which has been effected during the last five years. The second Book, comprising an 'Epitome of the Equity Practice,' is an entirely new addition to the original work, and emanates from the pen of Mr. Archibald Brown, B.C.L. of Oxford, and of the Middle Temple, Barrister-at-Law, who has handled his subject in an eminently able and satisfactory manner. This 'Practice in Equity' embodies the whole procedure in its minutest details, and will, doubtless, be found most serviceable to practitioners as well as to students. Leaving out of question the use which this part of the work will be to the practitioner, there can be no doubt that to students the whole book will be as indispensable in the future as it has been in the past; and, as regards the second part, namely that portion of the work which relates to Equity Practice, we have no doubt that a proper knowledge of it will enable a student to successfully pass any examinations in the subject, whether it be at the Universities, at the Inns of Court, or in the Hall of the Incorporated Law Society."—*Oxford and Cambridge Undergraduates' Journal*.

"We know of no better introduction to the Principles of Equity."—  
CANADA LAW JOURNAL.

"Within the ten years which have elapsed since the appearance of the first edition of this work, its reputation has steadily increased, and it has long since been recognised by students, tutors and practitioners, as the best elementary treatise on the important and difficult branch of the law which forms its subject. In editing the fourth edition, Mr. Brown, while 'working up the language and contents of the book to the level of the new procedure introduced by the Judicature Acts,' noting changes of the law, and correcting minor errors, has wisely abstained from interference with the general character of the work, which equally with its lucidity and trustworthiness has shared in gaining the approval of the profession. But he has added a new feature in an Epitome of the Practice in Equity which forms a valuable complement to the 'Principles,' equally useful to the young practitioner and to the student, by whom Principles and Practice should be concurrently studied. We think Mr. Brown is to be congratulated on having produced a really useful Epitome, which while not attempting to supersede the larger Practices, will be found a safe guide to the Practitioner in all ordinary proceedings."—*Law Magazine and Review*.

In one volume, 8vo., 1874, price 18s., cloth,

## PRINCIPLES OF CONVEYANCING.

AN ELEMENTARY WORK FOR THE USE OF STUDENTS.

By HENRY C. DEANE, of Lincoln's Inn, Barrister-at-Law, sometime Lecturer to the Incorporated Law Society of the United Kingdom.

"Mr. Deane is one of the Lecturers of the Incorporated Law Society, and in his elementary work intended for the use of students, he embodies some lectures given at the hall of that society. It would weary our readers to take them over the ground necessarily covered by Mr. Deane. The first part is devoted to Corporeal Hereditaments, and the second to Conveyancing. The latter is prefaced by a very interesting 'History of Conveyancing,' and for practical purposes the chapter (Ch. 2, Part II.) on Conditions of Sale is decidedly valuable. The most recent legislation is handled by Mr. Deane in connexion with the old law, the Judicature Act and the Vendor and Purchaser Act both being considered in this chapter on Conditions of Sale. We might make some interesting quotations, but the work is one which those engaged in conveyancing should purchase and put on their shelves, and welcome it with the recommendations which we have already recorded."—*Law Times*.

"We hope to see this book, like *Snell's Equity*, a standard class-book in all Law Schools where English law is taught."—CANADA LAW JOURNAL.

"Mr. Deane has, we believe, succeeded in writing the very simplest work ever published on the abstruse subject of conveyancing; and has by his language and illustrations, explained points of law in a way that cannot be misunderstood. For this reason, and as being the most elementary work combining the elements of real property law with the principles of practical conveyancing, we can heartily recommend it as a first book on the subject of which it treats. As such we should think it would be both worthy and suitable to be named as one of the books that are required to be read as a preparation for the various Law Examinations."—*The Law*.

"It seems essentially the book for young conveyancers, and will, probably, in many cases supplant Williams. It is, in fact, a modern adaptation of Mr. Watkin's book on conveyancing, and is fully equal to its prototype."—*Irish Law Times*.

"A general review of the scope of Mr. Deane's volume and a perusal of several of its chapters

have brought us to the conclusion that, though its contents are purely elementary, and it contains nothing which is not familiar to the practitioner, it may be extremely useful to students, and especially to those gentlemen who are candidates for the various legal examinations. There are so many questions set now on case law that they would do well to peruse this treatise of Mr. Deane's, and use it in conjunction with a book of questions and answers. They will find a considerable amount of equity case law, especially in the second part of Mr. Deane's book, which comprises in substance some lectures delivered by the author at the Law Institution."—*Law Journal*.

"The first part of the volume is composed of a series of chapters on corporeal hereditaments, and the second part of some lectures on conveyancing recently delivered by the author at the Law Institution. It is enough to say that Mr. Deane writes clearly and to the point."—*Saturday Review*.

In 8vo., price cloth,

## A Summary of the Law and Practice in Admiralty.

FOR THE USE OF STUDENTS.

By EUSTACE SMITH,

Of the Inner Temple; Author of "A Summary of Company Law."

In 8vo., price cloth,

## A Summary of the Law and Practice in the Ecclesiastical Courts.

FOR THE USE OF STUDENTS.

By EUSTACE SMITH,

Of the Inner Temple; Author of "A Summary of Company Law," and "A Summary of the Law and Practice in Admiralty."

In one volume, 8vo., 1876, price 20s., cloth,

# PRINCIPLES OF THE COMMON LAW.

INTENDED FOR THE USE OF STUDENTS AND THE PROFESSION.

BY JOHN INDERMAUR, SOLICITOR,

AUTHOR OF "A MANUAL OF THE PRACTICE OF THE SUPREME COURT,"

"EPITOMES OF LEADING CASES," AND OTHER WORKS.

"This work, the author tells us in his Preface, is written mainly with a view to the examinations of the Incorporated Law Society; but we think it is likely to attain a wider usefulness. It seems, so far as we can judge from the parts we have examined, to be a careful and clear outline of the principles of the common law. It is very readable; and not only students, but many practitioners and the public might benefit by a perusal of its pages."—SOLICITORS' JOURNAL.

"Mr. Indermaur has very clear notions of what a law student should be taught to enable him to pass the examinations of the Incorporated Law Society. In this, his last work, the law is stated carefully and accurately, and the book will probably prove acceptable to students."—*Law Times*.

"Mr. Indermaur's book will doubtless be found a useful assistant in the legal pupil room. The statements of the law are, as far as they go, accurate, and have been skilfully reduced to the level of learners. Mr. Indermaur possesses one great merit of an instructor—he is able to bring out the salient points on wide subjects in a telling manner."—*Law Journal*.

"Mr. Indermaur has acquired a deservedly high reputation as a writer of convenient epitomes and compendiums of various branches of the Law for the use of students. Within the limits which the author has assigned to himself, he has certainly given proof of praiseworthy industry, accuracy, and clearness of exposition, which cannot fail to be of the greatest advantage to the law student. The practising solicitor will also find this a very useful compendium. Care has evidently been taken to note the latest decisions on important points of law. A full and well-constructed Index supplies every facility for ready reference."—*Law Magazine*.

"The works of Mr. Indermaur are the necessary outcome of the existing system of legal education, and are certainly admirably adapted to the needs of students. We observe that, in the preface to his Principles of the Common Law, the author announces that he had a collateral object in view—viz., to produce a work useful to the practitioner. To sessional practitioners, and those whose libraries are limited, we have no doubt that this work will prove a useful acquisition; but its special merit appears to us to be that it most adequately achieves that which was the author's principal object—namely, to supply a book upon the subject of Common Law which, whilst being elementary and readable on the one hand, yet also goes sufficiently into the subject to prepare students for examination. The author, who possesses a well-established reputation as a law tutor, and as an able and indefatigable writer of books for students, certainly knows precisely just what it is that students require, and that desideratum he has fully supplied. We might suppose that the work itself was the didactic embodiment of the prize answers to a voluminous code of examination questions on the subject of common law; and presenting, as it does, a lucid, careful, and accurate outline of the elementary principles applicable to contracts, torts, evidence, and damages, such a work cannot fail to prove abundantly useful to the student."—*Irish Law Times*.

In 8vo., 1878, price 10s., cloth.

## **A MANUAL OF THE PRACTICE OF THE SUPREME COURT OF JUDICATURE,**

In the Queen's Bench, Common Pleas, Exchequer, and Chancery Divisions. Intended for the use of Students. By JOHN INDERMAUR, Solicitor.

"This is a very useful student's book. It is clearly written, and gives such information as the student requires, without bewildering him with details. The portion relating to the Chancery Division forms an excellent introduction to the elements of the practice, and may be advantageously used, not only by articulated clerks, but also by pupils entering the chambers of equity draftsmen."—*Solicitors' Journal*.

"Intended for the use of students, this book is executed with that accurate knowledge and care which distinguish Mr. Indermaur. It treats carefully of the steps to be taken in the several divisions, and in the appendix is given a table of some of the principal times of proceedings. Not only the student but the practitioner will find this little volume of use."—*Law Times*.

"Mr. Indermaur's treatise is addressed to the attention of students; and what student but knows that the name of that author is a guarantee of the utility of any work so presented? His 'Manual of Practice,' while avoiding unnecessary details, furnishes a concise but complete elementary view of the procedure in the Chancery and Common Law Divisions of the High Court of Justice under the English Judicature Acts; and certainly any examination on the subject must be very unreasonable that a student who has mastered Mr. Indermaur's perspicuous reading on the practice could fail to pass."—*Irish Law Times*.

Fourth Edition, in 8vo., 1877, price 6s., cloth,

## **AN EPITOME OF LEADING COMMON LAW CASES; WITH SOME SHORT NOTES THEREON.**

Chiefly intended as a Guide to "SMITH'S LEADING CASES." By JOHN INDERMAUR, Solicitor (Clifford's Inn Prizeman, Michaelmas Term, 1872).

"We have received the third edition of the 'Epitome of Leading Common Law Cases,' by Mr. Indermaur, Solicitor. The first edition of this work was published in February, 1873, the second in April, 1874, and now we have a third edition dated September, 1875. No better proof of the value of this book can be furnished than the fact that in less than three years it has reached a third edition."—*Law Journal*.

Third Edition, in 8vo., 1877, price 6s., cloth,

## **AN EPITOME OF LEADING CONVEYANCING AND EQUITY CASES;**

WITH SOME SHORT NOTES THEREON, FOR THE USE OF STUDENTS.

By JOHN INDERMAUR, Solicitor, Author of "An Epitome of Leading Common Law Cases."

"We have received the second edition of Mr. Indermaur's very useful Epitome of Leading Conveyancing and Equity Cases. The work is very well done."—*Law Times*.

"The Epitome well deserves the continued patronage of the class—Students—for whom it is especially intended. Mr. Indermaur will soon be known as the 'Students' Friend.'"—*Canada Law Journal*.

Third Edition, in 8vo., 1880, price , cloth,

## **SELF-PREPARATION FOR THE FINAL EXAMINATION.**

CONTAINING A COMPLETE COURSE OF STUDY, WITH STATUTES, CASES, AND QUESTIONS;

And intended for the use of those Articled Clerks who read by themselves.

By JOHN INDERMAUR, Solicitor.

"In this edition Mr. Indermaur extends his counsels to the whole period from the intermediate examination to the final. His advice is practical and sensible: and if the course of study he recommends is intelligently followed, the articulated clerk will have laid in a store of legal knowledge more than sufficient to carry him through the final examination."—*Solicitors' Journal*.

"This book contains recommendations as to how a complete course of study for the above examination should be carried out, with reference to the particular books to be read *seriatim*. We need only remark that it is essential for a student to be set on the right tack in his reading, and that any one of ordinary ability, who follows the course set out by Mr. Indermaur, ought to pass with great credit."—*Law Journal*.

In 8vo., 1875, price 6s., cloth,

## **THE STUDENT'S GUIDE TO THE JUDICATURE ACTS, AND THE RULES THEREUNDER:**

Being a book of Questions and Answers intended for the use of Law Students.

By JOHN INDERMAUR, Solicitor.

"As the result of the well-advised method adopted by Mr. Indermaur, we have a Guide which will unquestionably be found most useful, not only to Students and Teachers for the purpose of examination, but to anyone desirous of acquiring a first acquaintanceship with the new system."—*Irish Law Times*.

In one volume, 8vo., 1874, price 21s., cloth,

# A NEW LAW DICTIONARY,

AND

## Institute of the whole Law;

EMBRACING FRENCH AND LATIN TERMS, AND REFERENCES TO THE AUTHORITIES, CASES, AND STATUTES.

By ARCHIBALD BROWN,

M.A. Edin. and Oxon., and B.C.L. Oxon., of the Middle Temple, Barrister-at-Law; Author of the "Law of Fixtures," "Analysis of Savigny's Obligations in Roman Law," &c.

"Mr. Brown has succeeded in the first essential, that of brevity. He has compressed into a wonderfully small compass a great deal of matter. Our impression is that the work has been carefully executed."—SOLICITORS' JOURNAL.

"This work, laborious and difficult as it was, has been admirably carried out, and the work is really what it professes to be, a complete compendium. An index to a dictionary is a novelty, but from the exceptional nature of the contents an index was likely to be most useful, and accordingly Mr. Brown has prefixed to the book a copious index by which a student can at once turn to the main body of the work and obtain the information he requires. Authorities and cases are abundantly cited, and Mr. Brown can claim with justice to call his book an institute of the whole law."—Standard.

"In a modest preface Mr. Brown introduces us to a rather ambitious work. He has endeavoured to compress into less than

four hundred pages the whole law of England, and has evidently bestowed much pains on the execution of the task. He does not, however, aim at anything higher than rendering a service to students preparing for the Bar or for the lower branch of the profession, and there can be no doubt that he has produced a book of reference which will be useful to the class he has had in view. Mr. Brown has perhaps done about as much as any one, not a rare genius, could do, and his Dictionary will be serviceable to those who are in want of hints and references, and are content with a general idea of a law or legal principle. It is a handy book to have at one's elbow."

—Saturday Review.

"This book has now been for some time published, and we have had many opportunities of referring to it. We find it an admirable Law Dictionary, and something more, inasmuch as it contains elaborate historical and antiquarian analyses of our legal system under the several headings. The student and the literary man will find the book very useful in reading and writing. Indeed the people who are not lawyers, but who nevertheless feel a desire or are under a necessity to use legal terms, or who meet them in their course of study, cannot do better than obtain a copy of this work and use it judiciously; they will thereby be enabled to avoid the ludicrous errors into which novelists in particular, and public speakers too, are often led by the inappropriate use of terms whose meanings they do not perfectly comprehend."—IRISH LAW TIMES.

In 8vo., 1875, price 12s., cloth,

# THE LAW OF FIXTURES.

Third Edition. Including the Law under the

## AGRICULTURAL HOLDINGS ACT, 1875,

Incorporating the principal American Decisions, and generally bringing the law down to the present time.

By ARCHIBALD BROWN, M.A. Edin. and Oxon., and B.C.L. Oxon.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

"The decisions given since the second edition of this work was published in the important cases of *Ex parte Daglish*, in *re Wilde*, and *Ex parte Barclay*, in *re Joyce*, and several other further decisions of the Courts on the Law of Fixtures, have rendered a third edition desirable. The author has taken the opportunity to recast the general form of his treatise. . . . We have already adverted to the recent cases of *Ex parte Daglish*, in *re Wilde*, and *Ex parte Barclay*, in *re Joyce*. The author treats of them at some length; and the conclusion at which he arrives is very important,

and claims the attention of legal draftsmen and solicitors.

We have touched on the principal features of this new edition, and we have not space for further remarks on the book itself; but we may observe that the particular circumstances of the cases cited are in all instances sufficiently detailed to make the principle of law clear; and though very many of the principles given are in the very words of the judges, at the same time the author has not spared to deduce his own observations, and the treatise is commendable as well for originality as for labouriousness."—Law Journal.



In 8vo., 1877, price 20s., cloth,

# PRINCIPLES OF THE CRIMINAL LAW.

INTENDED AS A LUCID EXPOSITION OF THE SUBJECT FOR THE USE  
OF STUDENTS AND THE PROFESSION,

By SEYMOUR F. HARRIS, B.C.L., M.A.,

Of Worcester College, Oxford, and the Inner Temple, Barrister-at-Law; Author of  
"A Concise Digest of the Institutes of Gaius and Justinian."

## REVIEWS.

"There is no lack of Works on Criminal Law, but there was room for such a useful handbook of Principles as Mr. Seymour Harris has supplied. Accustomed, by his previous labours, to the task of analysing the law, Mr. Harris has brought to bear upon his present work qualifications well adapted to secure the successful accomplishment of the object which he had set before him. That object is not an ambitious one, for it does not pretend to soar above utility to the young practitioner and the student. For both these classes, and for the yet wider class who may require a book of reference on the subject, Mr. Harris has produced a clear and convenient Epitome of the Law. A noticeable feature of Mr. Harris's work, which is likely to prove of assistance both to the practitioner and the student, consists of a Table of Offences, with their legal character, their punishment, and the statute under which it is inflicted, together with a reference to the pages where a Statement of the Law will be found."—LAW MAGAZINE AND REVIEW.

"This work purports to contain 'a concise exposition of the nature of crime, the various offences punishable by the English law, the law of criminal procedure, and the law of summary convictions,' with tables of offences, punishments, and statutes. The work is divided into four books. Book I. treats of crime, its divisions and essentials; of persons capable of committing crimes; and of principals and accessories. Book II. deals with offences of a public nature; offences against private persons; and offences against the property of individuals. Each crime is discussed in its turn, with as much brevity as could well be used consistently with a proper explanation of the legal characteristics of the several offences. Book III. explains criminal procedure, including the jurisdiction of Courts, and the various steps in the apprehension and trial of criminals from arrest to punishment. This part of the work is extremely well done, the description of the trial being excellent, and thoroughly calculated to impress the mind of the uninitiated. Book IV. contains a short sketch of 'summary convictions before magistrates out of quarter sessions.' The table of offences at the end of the volume is most useful, and there is a very full index. Altogether we must congratulate Mr. Harris on his adventure."—LAW JOURNAL.

"Mr. Harris has undertaken a work, in our opinion, so much needed that he might diminish its bulk in the next edition by obliterating the apologetic preface. The appearance of his volume is as well timed as its execution is satisfactory. The author has shown an ability of omission which is a good test of skill, and from the overwhelming mass of the criminal law he has discreetly selected just so much only as a learner needs to know, and has presented it in terms which render it capable of being easily taken into the mind. The first half of the volume is devoted to indictable offences, which are defined and explained in succinct terms; the second half treats of the prevention of offences, the courts of criminal jurisdiction, arrest, preliminary proceedings before magistrates, and modes of prosecution and trial; and a brief epitome of the laws of evidence, proceedings after trial, and summary convictions, with a table of offences, complete the book. The part on procedure will be found particularly useful. Few young counsel, on their first appearance at sessions, have more than a loose and general notion of the manner in which a trial is conducted, and often commit blunders which, although trifling in kind, are nevertheless seriously discouraging and annoying to themselves at the outset of their career. From even such a blunder as that of mistaking the order in which the speeches are made and witnesses examined, they may be saved by the table of instructions given here."—SOLICITORS' JOURNAL.

"Le livre de M. Seymour F. Harris est un manuel de droit criminel destiné aux étudiants en droit et aux praticiens. Il contient une exposition concise mais complète, sobre mais très-claire des faits punissables, des peines édictées par la loi, de l'organisation des juridictions criminelles et de la manière de procéder devant elles. Ce qui est surtout précieux pour ceux auxquels cet ouvrage est destiné, c'est une table méthodique des faits punis par la loi, des peines qui leur sont applicables et des lois qui les prononcent. Cette table et l'indication, au bas de chaque page, du texte de loi dont le résumé est donné dans le livre, rendront cet ouvrage indispensable à ceux qui, dans ce pays, veulent connaître cette loi criminelle anglaise qui s'écarte tant de la législation française, et qui est toujours l'objet de la curiosité en même temps que de l'admiration. D'ailleurs, en ce moment où l'on soulève tant de questions touchant la répression pénale, cette étude du droit criminel anglais est devenue indispensable. On ne pourra mieux la faire que dans le manuel de droit criminel dont nous parlons ici et que nous ne louons que comme il le mérite."—Revue Gén. du Droit 1878.

In one volume, 8vo., (November) 1878, price 9s. cloth,

# LEADING STATUTES SUMMARISED, FOR THE USE OF STUDENTS.

By ERNEST C. THOMAS,

Bacon Scholar of the Hon. Society of Gray's Inn, late Scholar of Trinity College, Oxford;

Author of "Leading Cases in Constitutional Law Briefly Stated."

"Will doubtless prove of much use to students for whom it is intended. . . . Any student who, with this brief summary as a guide, carefully studies the enactments themselves in the Revised Edition of the Statutes, cannot fail to gain a very considerable acquaintance with every branch of English law."—*Law Magazine*.

"Mr. Thomas has done a useful piece of work in compiling a little book which is not intended to save students the trouble of looking at the statutes for themselves, but which will be valuable both to guide them through 'the single sentences of enormous length,' of which Sir James Stephen has spoken, and as a convenient book of reference."—*Saturday Review*.

"This is an ingenious work. The author, feeling that students, like a good many more experienced persons, are rather bothered with the gigantic bulk of our statute law, has hit upon the idea of picking out more than one hundred statutes of general practical importance, and giving a summary of them. He divides these into three classes, and places them under the titles, 'Common Law,' 'Criminal Law,' and 'Equity and Conveyancing.' There is an index to the volume, which enables the reader to find at once the Act he wants; and the summaries seem to be accurate and sufficiently full. Of course the book belongs to the list of 'cram' instructors; but it has merits beyond those of mere help to examination."—*Law Journal*.

In 8vo., 1876, price 6s., cloth,

# LEADING CASES IN CONSTITUTIONAL LAW

BRIEFLY STATED, WITH INTRODUCTION, EXCURSUSES, AND NOTES.

By ERNEST C. THOMAS,

Bacon Scholar of the Hon. Society of Gray's Inn, late Scholar of Trinity College, Oxford.

"Mr. E. C. Thomas has put together in a slim octavo a digest of the principal cases illustrating Constitutional Law, that is to say, all questions as to the rights or authority of the Crown or persons under it, as regards not merely the constitution and structure given to the governing body, but also the mode in which the sovereign power is to be exercised. In an introductory essay Mr. Thomas gives a very clear and intelligent survey of the general functions of the Executive, and the principles by which they are regulated; and then follows a summary of leading cases."—*Saturday Review*.

"Mr. Thomas gives a sensible introduction and a brief epitome of the familiar leading cases."—*Law Times*.

In 8vo., 1876, price 8s., cloth,

# AN EPITOME OF HINDU LAW CASES, WITH SHORT NOTES THEREON.

And Introductory Chapters on

SOURCES OF LAW, MARRIAGE, ADOPTION, PARTITION, AND  
SUCCESSION.

By WILLIAM M. P. COGHLAN,

BOMBAY CIVIL SERVICE, JUDGE AND SESSIONS JUDGE OF TANNA.

"Apart, altogether, from their professional value, these introductory chapters are interesting to the layman, as presenting a series of curiously exact photographs of every day Hindu life, which are further illustrated by the rulings of the various High Courts. We have only space to direct the readers' attention to the chapters on marriage, and the cases cited, for we made use of this text-book among others in discussing the Hindu marriage laws in our columns last year. Mr. Coghlan is well known as the Judge and Session Judge of Tanna, and as one of the closest students of Hindu life as well as of Hindu law. His volume is already a text-book to the students of Hindu law in England, and should also find a welcome here from practitioners, and even, through the intrinsic interest of the subject and the ability of treatment, from those general readers who may be interested in Indian matters."—*Times of India*.

"Mr. Coghlan, Judge and Sessions Judge of Tanna, has prepared an epitome of some Hindoo law cases as a guide to the law reports and to the standard text-books. Apart from its professional value, it presents a curious picture of Hindoo customs and ideas on various subjects, such as marriage, family ties, &c."—*Saturday Review*.

*In a handy volume, 1876, price 5s., cloth,*

## RAILWAY PASSENGERS & RAILWAY COMPANIES : Their Duties, Rights and Liabilities.

By LOUIS ARTHUR GOODEVE, of the Middle Temple,  
Barrister-at-Law.

"Mr. Goodeve's little book is a concise epitome of the Acts, Bye-laws, and Cases relating to passengers and their personal luggage. It is clearly written, and the reader is able speedily enough to find any point upon which he desires to inform himself."—*Law Journal*.

"Mr. Goodeve has rendered a service to the public in making a digest of the law relating to railway passengers, including the respective duties, rights, and liabilities of the Companies on the one hand and passengers on the other, as laid down by the statutes and the decisions of the Superior Courts. The various points are treated in a clear yet concise manner; and it is to be hoped that this little work will be widely studied so that people may know what are their rights, and take steps to maintain them."—*Saturday Review*.

"After reading the volume with great interest, we can only say that it is clear, compact, and accurate. Passengers who want *reliable* information should consult this book."—*Sheffield Post*.

### EUROPEAN ARBITRATION.

Part I., price 7s. 6d., sewed,

## LORD WESTBURY'S DECISIONS.

Reported by FRANCIS S. REILLY, of Lincoln's Inn, Barrister-at-Law.

### ALBERT ARBITRATION.

Parts I., II., and III., price 25s., sewed,

## LORD CAIRNS'S DECISIONS.

Reported by FRANCIS S. REILLY, of Lincoln's Inn, Barrister-at-Law.

In 8vo., 1871, price 21s., cloth,

## A TREATISE ON THE STATUTES OF ELIZABETH AGAINST FRAUDULENT CONVEYANCES.

*The Bills of Sale Registration Acts, and the Law of Voluntary  
Dispositions of Property generally.*

By H. W. MAY, B.A. (Ch. Ch. Oxford), and of Lincoln's Inn, Barrister-at-Law.

"This treatise has not been published before it was wanted. The statutes of Elizabeth against fraudulent conveyances have now been in force for more than three hundred years. The decisions under them are legion in number, and not at all times consistent with each other. An attempt to reduce the mass of decisions into something like shape, and the exposition of legal principles involved in the decisions, under any circumstances, must have been a work of great labour, and we are pleased to observe that in the book before us there has been a combination of unusual labour with considerable professional skill. . . . We cannot conclude our notice of this work without saying that it reflects great credit on the publishers as well as the author. The facilities afforded by Messrs. Stevens and Haynes for the publication of treatises by rising men in our profession are deserving of all praise. We feel assured that they do not lightly lend their aid to works presented for publication, and that in consequence publication by such a firm is to some extent a guarantee of the value of the work published."—*Canada Law Journal*.

"Examining Mr. May's book, we find it constructed with an intelligence and precision which render it entirely worthy of being accepted as a guide in this confessedly difficult subject. The subject is an involved one, but with clear and clear handling it is here presented as clearly as it could be. . . . On the whole, he has produced a very useful book of an exceptionally scientific character."—*Solicitors' Journal*.

"The subject and the work are both very good. The former is well chosen, new, and interesting; the latter has the quality which always distinguishes original research from borrowed labours."—*American Law Review*.

"We are happy to welcome his (Mr. May's) work as an addition to the, we regret to say, brief catalogue of law books conscientiously executed. We can corroborate his own description of his labours, 'that no pains have been spared to make the book as concise and practical as possible, without doing so at the expense of perspicuity, or by the omission of any important points.'"—*Law Times*.

In one volume, 8vo., 1875, price 25s., cloth,

## AN ESSAY

ON

# THE RIGHTS OF THE CROWN

AND THE

PRIVILEGES OF THE SUBJECT

## In the Sea Shores of the Realm.

By ROBERT GREAM HALL, of Lincoln's Inn, Barrister-at-Law. Second Edition. Revised and corrected, together with extensive Annotations, and references to the later Authorities in England, Scotland, Ireland, and the United States. By RICHARD LOVELAND LOVELAND, of the Inner Temple, Barrister-at-Law.

"This is an interesting and valuable book. It treats of one of those obscure branches of the law which there is no great inducement for a legal writer to take up. . . . Mr. Hall, whose first edition was issued in 1830, was a writer of considerable power and method. Mr. Loveland's editing reflects the valuable qualities of the 'Essay' itself. He has done his work without pretension, but in a solid and efficient manner. The 'Summary of Contents' gives an admirable epitome of the chief points discussed in the 'Essay,' and indeed, in some twenty propositions, supplies a useful outline of the whole law. Recent cases are noted at the foot of each page with great care and accuracy, while an Appendix contains much valuable matter; including Lord Hale's treatise *De Jure Maris*, about which there has been so much controversy, and Serjeant Merewether's learned argument on the rights in the river Thames. The book will, we think, take its place as the modern authority on the subject."—*Law Journal*.

"The treatise, as originally published, was one of considerable value, and has ever since been quoted as a standard authority. But as time passed, and cases accumulated, its value diminished, as it was

necessary to supplement it so largely by reference to cases since decided. A tempting opportunity was, therefore, offered to an intelligent editor to supply this defect in the work, and Mr. Loveland has seized it, and proved his capacity in a very marked manner. As very good specimens of annotation, showing clear judgment in selection, we may refer to the subject of alluvion at page 109, and the rights of fishery at page 50. At the latter place he begins his notes by stating under what expressions a 'several fishery' has been held to pass, proceeding subsequently to the evidence which is sufficient to support a claim to ownership of a fishery. The important question under what circumstances property can be acquired in the soil between high and low water mark is lucidly discussed at page 77, whilst at page 81 we find a pregnant note on the property of a grantee of wreck in goods stranded within his liberty.

"We think we can promise Mr. Loveland the reward for which alone he says he looks—that this edition of Hall's Essay will prove a most decided assistance to those engaged in cases relating to the foreshores of the country."—*Law Times*.

"The entire book is masterly."—ALBANY LAW JOURNAL.

In one volume, 8vo., 1877, price 12s., cloth,

A TREATISE ON THE LAW RELATING TO THE

## POLLUTION AND OBSTRUCTION OF WATER COURSES;

Together with a Brief Summary of the Various Sources of Rivers Pollution.

By CLEMENT HIGGINS, M.A., F.C.S.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"As a compendium of the law upon a special and rather intricate subject, this treatise cannot but prove of great practical value, and more especially to those who have to advise upon the institution of proceedings under the Rivers Pollution Preventive Act, 1876, or to adjudicate upon those proceedings when brought."—*Irish Law Times*.

"We can recommend Mr. Higgins' Manual as the best guide we possess."—*Public Health*.

"County Court Judges, Sanitary Authorities, and Riparian Owners will find in Mr. Higgins' Treatise a valuable aid in obtaining a clear notion of the Law on the subject. Mr. Higgins has accomplished a work for which he will readily be recognised as having special fitness, on account

of his practical acquaintance both with the scientific and the legal aspects of his subject."—*Law Magazine and Review*.

"The volume is very carefully arranged throughout, and will prove of great utility both to miners and to owners of land on the banks of rivers."—*The Mining Journal*.

"Mr. Higgins writes tersely and clearly, while his facts are so well arranged that it is a pleasure to refer to his book for information; and altogether the work is one which will be found very useful by all interested in the subject to which it relates."—*Engineer*.

"A compact and convenient manual of the law on the subject to which it relates."—*Solicitors' Journal*.

In 8vo., THIRD EDITION, (November) 1877, price 25s., cloth,

# MAYNE'S TREATISE ON THE LAW OF DAMAGES.

Third Edition.

BY

JOHN D. MAYNE,

Of the Inner Temple, Barrister-at-Law;

AND

LUMLEY SMITH,

Of the Inner Temple, Barrister-at-Law.

*"During the twenty-two years which have elapsed since the publication of this well-known work, its reputation has been steadily growing, and it has long since become the recognised authority on the important subject of which it treats."*—LAW MAGAZINE AND REVIEW.

"This edition of what has become a standard work has the advantage of appearing under the supervision of the original author as well as of Mr. Lumley Smith, the editor of the second edition. The result is most satisfactory. Mr. Lumley Smith's edition was ably and conscientiously prepared, and we are glad to find that the reader still enjoys the benefit of his accuracy and learning. At the same time the book has doubtless, been improved by the reappearance of its author as co-editor. The earlier part, indeed, has been to a considerable extent entirely rewritten.

"Upon the general principles, according to which damages are to be assessed in actions of contract, *Hadley v. Baxendale* (9 Ex. 341) still remains the leading authority, and furnishes the text for the discussion contained in the second chapter of Mr. Mayne's book. Properly understood and limited, the rule proposed in that case, although in one respect not very happily worded, is a sound one, and has been repeatedly approved both in England and America. The subsequent decisions, which are concisely summarized by Mr. Mayne, have established that mere knowledge of special circumstances is not enough, unless it can be inferred from the whole transaction that the contractor consented to become liable to the extra damage. This limitation is obviously just, especially in the case of persons, such as common carriers, who have no option to refuse the contract. Mere knowledge on their part of special circumstances ought not, and, according to the *dicta* of the judges in the Exchequer Chamber in *Horne v. Midland Railway Company* (21 W. R. 481, L. R. 8 C. P. 131), would not involve the carrier in additional responsibility. Mr. Mayne's criticism of the numerous cases in which this matter has been considered leaves nothing to be desired, and the rules he deduces therefrom (pp. 32, 33) appear to us to exhaust the subject.

"Mr. Mayne's remarks on damages in actions of tort are brief. We agree with him that in such actions the courts are governed by far looser principles than in contracts; indeed, sometimes it is impossible to say they are governed by any principles at all. In actions for injuries to the person or reputation, for example, a judge cannot do more than give a general direction to the jury to give what the facts proved in their judgment required. And, according to the better opinion, they may give damages 'for example's sake,' and mulct a rich man more heavily than a poor one. In actions for injuries to property, however, 'vindictive' or 'exemplary' damages cannot, except in very rare cases, be awarded, but must be limited, as in contract, to the actual harm sustained.

"The subject of remoteness of damage is treated at considerable length by Mr. Mayne, and we notice that much new matter has been added. Thus the recent case of *Riding v. Smith* (24 W. R. 487, 1 Ex. D. 91) furnishes the author with an opportunity of discussing the well-known rule in *Ward v. Weeks* (7 Bing. 211) that injury resulting from the repetition of a slander is not actionable. The rule has always seemed to us a strange one, if a man is to be made responsible for the natural consequences of his acts. For every one who utters a slander may be perfectly certain that it will be repeated.

"It is needless to comment upon the arrangement of the subjects in this edition, in which no alteration has been made. The editors modestly express a hope that all the English as well as the principal Irish decisions up to the date have been included, and we believe from our own examination that the hope is well founded. We may regret that, warned by the growing bulk of the book, the editors have not included any fresh American cases, but we feel that the omission was unavoidable. We should add that the whole work has been thoroughly revised."—*Solicitors' Journal*.

*"This text-book is so well known, not only as the highest authority on the subject treated of, but as one of the best text-books ever written, that it would be idle for us to speak of it in the words of commendation that it deserves. It is a work that no practising lawyer can do without."*—CANADA LAW JOURNAL.

In 8vo., price 2s., sewed,

**TABLE of the FOREIGN MERCANTILE LAWS and CODES**  
in Force in the Principal States of EUROPE and AMERICA. By CHARLES LYON-CAEN, Professeur agrégé à la Faculté de Droit de Paris; Professeur à l'Ecole libre des Sciences politiques. Translated by NAPOLEON ARGLES, Solicitor, Paris.

In one volume, demy 8vo., 1866, price 10s. 6d., cloth,

**PRINCIPLES OF THE LAW OF STOPPAGE IN TRANSITU, RETENTION, AND DELIVERY.**

By JOHN HOUSTON, of the Middle Temple, Barrister-at-Law.

"We have no hesitation in saying, that we think Mr. Houston's book will be a very useful accession to the library of either the merchant or the lawyer."  
—*Solicitors' Journal*.

"We have, indeed, met with few works which so

successfully surmount the difficulties in the way of this arduous undertaking as the one before us; for the language is well chosen, it is exhaustive of the law, and is systematised with great method."  
—*American Law Review*.

In 8vo., 1870, price 10s. 6d., cloth,

**A REPORT OF THE CASE OF  
THE QUEEN v. GURNEY AND OTHERS.**

In the Court of Queen's Bench before the Lord Chief Justice COCKBURN. With an Introduction, containing a History of the Case, and an Examination of the Cases at Law and Equity applicable to it; or Illustrating THE DOCTRINE OF COMMERCIAL FRAUD. By W. F. FINLASON, Barrister-at-Law.

"It will probably be a very long time before the prosecution of the Overend and Gurney directors is forgotten. It remains as an example, and a legal precedent of considerable value. It involved the immensely important question where innocent misrepresentation ends, and where fraudulent misrepresentation begins.

"All who perused the report of this case in the columns of the *Times*, must have observed the remarkable fulness and accuracy with which that

duty was discharged, and nothing could be more natural than that the reporter should publish a separate report in book form. This has been done, and Mr. Finlason introduces the report by one hundred pages of dissertation on the general law. To this we shall proceed to refer, simply remarking before doing so, that the charge to the jury has been carefully revised by the Lord Chief Justice."  
—*Law Times*.

12mo., 1866, price 10s. 6d., cloth,

**A TREATISE ON THE GAME LAWS OF ENGLAND AND WALES:**

Including Introduction, Statutes, Explanatory Notes, Cases, and Index. By JOHN LOCKE, M.P., Q.C., Recorder of Brighton. The Fifth Edition, in which are introduced the GAME LAWS of SCOTLAND and IRELAND. By GILMORE EVANS, of the Inner Temple, Barrister-at-Law.

In royal 8vo., 1867, price 10s. 6d., cloth,

**THE PRACTICE OF EQUITY BY WAY OF REVIVOR & SUPPLEMENT.**

With Forms of Orders and Appendix of Bills.

By LOFTUS LEIGH PEMBERTON, of the Chancery Registrar's Office.

"Mr. Pemberton has, with great care, brought together and classified all these conflicting cases, and has, as far as may be, deduced principles which

will probably be applied to future cases."  
—*Solicitors' Journal*.

In 8vo., 1873, price 5s., cloth,

**THE LAW OF PRIORITY.**

A Concise View of the Law relating to Priority of Incumbrances and of other Rights in Property. By W. G. ROBINSON, M.A., Barrister-at-Law.

"Mr. Robinson's book may be recommended to the advanced student, and will furnish the practi-

tioner with a useful supplement to larger and more complete works."  
—*Solicitors' Journal*.

# ELECTION LAW.

In crown 8vo., 1874, price 14s., cloth,

## A MANUAL OF THE PRACTICE OF PARLIAMENTARY ELECTIONS

*Throughout Great Britain and Ireland.*

COMPRISING

THE DUTIES OF RETURNING OFFICERS AND THEIR DEPUTIES,  
TOWN CLERKS, AGENTS, POLL-CLERKS, &c.,

AND THE

*Law of Election Expenses, Corrupt Practices, & Illegal Payments.*

WITH

**AN APPENDIX OF STATUTES AND AN INDEX.**

By HENRY JEFFREYS BUSHBY, ESQ.,

One of the Metropolitan Police Magistrates, sometime Recorder of Colchester.

FOURTH EDITION,

*Adapted to and embodying the recent changes in the Law, including the Ballot Act, the Instructions to Returning Officers in England and Scotland issued by the Home Office, and the whole of the Statute Law relating to the subject.*

Edited by HENRY HARDCASTLE,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"We have just received at a very opportune moment the new edition of this useful work. We need only say that those who have to do with elections will find 'Bushby's Manual' replete with information and trustworthy, and that Mr. Hardcastle has incorporated all the recent changes of the law."—*Law Journal*.

"As far as we can judge, Mr. Hardcastle, who

is known as one of the joint editors of O'Malley and Hardcastle's Election Reports, has done his work well. . . . For practical purposes, as a handy manual, we can recommend the work to returning officers, agents, and candidates; and returning officers cannot do better than distribute this manual freely amongst their subordinates, if they wish them to understand their work."—*Solicitors' Journal*.

A Companion Volume to the above, in crown 8vo., 1874, price 8s., cloth,

## THE LAW AND PRACTICE OF ELECTION PETITIONS,

With an Appendix containing the Parliamentary Elections Act, 1868, the General Rules for the Trial of Election Petitions in England, Scotland, and Ireland, Forms of Petitions, &c. By HENRY HARDCASTLE, of the Inner Temple, Barrister-at-Law.

"Mr. Hardcastle gives us an original treatise with foot notes, and he has evidently taken very considerable pains to make his work a reliable guide. Beginning with the effect of the Election Petitions Act, 1868, he takes his readers step by step through the new procedure. His mode of treating the subject of 'particulars' will be found

extremely useful, and he gives all the law and practice in a very small compass. In an Appendix is supplied the Act and the Rules. We can thoroughly recommend Mr. Hardcastle's book as a concise manual on the law and practice of election petitions."—*Law Times*.

Now ready, Volume I., price 30s.; Volume II., price 24s.;  
and Volume III., Part I., price 5s.

## REPORTS OF THE DECISIONS

OF THE

## JUDGES FOR THE TRIAL OF ELECTION PETITIONS IN ENGLAND AND IRELAND.

PURSUANT TO THE PARLIAMENTARY ELECTIONS ACT, 1868.

By EDWARD LOUGHLIN O'MALLEY AND HENRY HARDCASTLE.

*Stevens and Haynes' Series of Reprints of the Early Reporters.*

## SIR BARTHOLOMEW SHOWER'S PARLIAMENTARY CASES.

In 8vo., 1876, price 4*l.* 4*s.*, best calf binding,

## SHOWER'S CASES IN PARLIAMENT

*Resolved and Adjudged upon Petitions and Writs of Error.*

### FOURTH EDITION.

**CONTAINING ADDITIONAL CASES NOT HITHERTO REPORTED.**

REVISED AND EDITED BY

RICHARD LOVELAND LOVELAND,

Of the Inner Temple, Barrister-at-Law; Editor of "Kelyng's Crown Cases," and  
"Hall's Essay on the Rights of the Crown in the Seashore."

"Messrs. STEVENS & HAYNES, the successful publishers of the Reprints of Bellewe, Cooke, Cunningham, Brookes' New Cases, Choyce Cases in Chancery, William Kelynge and Kelyng's Crown Cases, determined to issue a new or fourth Edition of Shower's Cases in Parliament.

"The volume, although beautifully printed on old-fashioned paper, in old-fashioned type, instead of being in the quarto, is in the more convenient octavo form, and contains several additional cases not to be found in any of the previous editions of the work.

"These are all cases of importance, worthy of being ushered into the light of the world by enterprising publishers.

"Shower's Cases are models for reporters, even in our day. The statements of the case, the arguments of counsel, and the opinions of the Judges, are all clearly and ably given.

"This new edition with an old face of these valuable reports, under the able editorship of R. L. Loveland, Esq., should, in the language of the advertisement, 'be welcomed by the profession, as well as enable the custodians of public libraries to complete or add to their series of English Law Reports.'"—*Canada Law Journal*.

### BELLEWE'S CASES, T. RICHARD II.

In 8vo., 1869, price 3*l.* 3*s.*, bound in calf antique,

## LES ANS DU ROY RICHARD LE SECOND.

Collect' ensemble' hors les abridgments de Statham, Fitzherbert, et Brooke. Per  
RICHARD BELLEWE, de Lincolns Inne. 1585. Reprinted from the Original  
Edition.

"No public library in the world, where English law finds a place, should be without a copy of this edition of Bellewe."—*Canada Law Journal*.

"We have here a *fac-simile* edition of Bellewe, and it is really the most beautiful and admirable reprint that has appeared at any time. It is a perfect gem of antique printing, and forms a most interesting monument of our early legal history. It belongs to the same class of works as the Year Book of Edward I. and other similar works which have been printed in our own time under the auspices of the Master of the Rolls; but is far superior to any of them, and is in this respect

highly creditable to the spirit and enterprise of private publishers. The work is an important link in our legal history; there are no year books of the reign of Richard II., and Bellewe supplied the only substitute by carefully extracting and collecting all the cases he could find, and he did it in the most convenient form—that of alphabetical arrangement in the order of subjects, so that the work is a digest as well as a book of law reports. It is in fact a collection of cases of the reign of Richard II., arranged according to their subjects in alphabetical order. It is, therefore, one of the most intelligible and interesting legal memorials of the Middle Ages."—*Law Times*.

## CUNNINGHAM'S REPORTS.

In 8vo., 1871, price 3*l.* 3*s.*, calf antique,

CUNNINGHAM'S (T.) Reports in K. B., 7 to 10 Geo. II.; to which is prefixed a Proposal for rendering the Laws of England clear and certain, humbly offered to the Consideration of both Houses of Parliament. Third Edition, with numerous Corrections. By THOMAS TOWNSEND BUCKNILL, Barrister-at-Law.

"The instructive chapter which precedes the cases, entitled 'A proposal for rendering the Laws of England clear and certain,' gives the volume a degree of peculiar interest, independent of the value of many of the reported cases. That chapter begins with words which ought, for the information of every people, to be printed in letters of gold. They are as follows: 'Nothing conduces more to the

peace and prosperity of every nation than good laws and the due execution of them.' The history of the civil law is then rapidly traced. Next a history is given of English Reporters, beginning with the reporters of the Year Books from 1 Edw. III. to 12 Hen. VIII.—being near 200 years—and afterwards to the time of the author."—*Canada Law Journal*.



## Stevens and Haynes' Series of Reprints of the Early Reporters.

## CHOYCE CASES IN CHANCERY.

In 8vo., 1870, price 2*l.* 2*s.*, calf antique,

## THE PRACTICE OF THE HIGH COURT OF CHANCERY.

With the Nature of the several Offices belonging to that Court. And the Reports of many Cases wherein Relief hath been there had, and where denied.

"This volume, in paper, type, and binding (like "*Bellewe's Cases*") is a facsimile of the antique edition. All who buy the one should buy the other."—*Canada Law Journal*.

In 8vo., 1872, price 3*l.* 3*s.*, calf antique,

## SIR G. COOKE'S COMMON PLEAS REPORTS

In the Reigns of Queen Anne, and Kings George I. and II.

The Third Edition, with Additional Cases and References contained in the Notes taken from L. C. J. EYRE'S MSS. by Mr. Justice NARES, edited by THOMAS TOWNSEND BUCKNILL, of the Inner Temple, Barrister-at-Law.

"Law books never can die or remain long dead so long as Stevens and Haynes are willing to continue them or revive them when dead. It is certainly surprising to see with what facial accuracy

an old volume of Reports may be produced by these modern publishers, whose good taste is only equalled by their enterprise."—*Canada Law Journal*.

## BROOKE'S NEW CASES WITH MARCH'S TRANSLATION.

In 8vo., 1873, price 4*l.* 4*s.*, calf antique,

BROOKE'S (Sir Robert) New Cases in the time of Henry VIII., Edward VI., and Queen Mary, collected out of Brooke's Abridgment, and arranged under years, with a table, together with MARCH'S (John) *Translation of BROOKE'S New Cases* in the time of Henry VIII., Edward VI., and Queen Mary, collected out of BROOKE'S Abridgment, and reduced alphabetically under their proper heads and titles, with a table of the principal matters. In one handsome volume. 8vo. 1873.

"Both the original and the translation having long been very scarce, and the mispaging and other errors in March's translation making a new and corrected edition peculiarly desirable, Messrs.

Stevens and Haynes have reprinted the two books in one volume, uniform with the preceding volumes of the series of Early Reports."—*Canada Law Journal*.

## KELYNGE'S (W.) REPORTS.

In 8vo., 1873, price 4*l.* 4*s.*, calf antique,

KELYNGE'S (William) Reports of Cases in Chancery, the King's Bench, &c., from the 3rd to the 9th year of His late Majesty King George II., during which time Lord King was Chancellor, and the Lords Raymond and Hardwicke were Chief Justices of England. To which are added, seventy New Cases not in the First Edition. Third Edition. In one handsome volume. 8vo. 1873.

## KELYNG'S (SIR JOHN) CROWN CASES.

In 8vo., 1873, price 4*l.* 4*s.*, calf antique,

KELYNG'S (Sir J.) Reports of Divers Cases in Pleas of the Crown in the Reign of King Charles II., with Directions to Justices of the Peace, and others; to which are added, Three Modern Cases, viz., Armstrong and Lisle, the King and Plummer, the Queen and Mawgridge. Third Edition, containing several additional Cases never before printed, together with a TREATISE UPON THE LAW AND PROCEEDINGS IN CASES OF HIGH TREASON, first published in 1793. The whole carefully revised and edited by RICHARD LOVELAND LOVELAND, of the Inner Temple, Barrister-at-Law.

"We look upon this volume as one of the most important and valuable of the unique reprints of Messrs. Stevens and Haynes. Little do we know of the mines of legal wealth that lie buried in the old law books. But a careful examination, either of the reports or of the treatise embodied in the volume now before us, will give the reader some idea of the

good service rendered by Messrs. Stevens & Haynes to the profession. . . Should occasion arise, the Crown prosecutor as well as counsel for the prisoner will find in this volume a complete *vade mecum* of the law of high treason and proceedings in relation thereto."—*Canada Law Journal*.

In one volume, octavo, (October) 1878, price 25s., cloth,

# A CONCISE TREATISE ON Private International Jurisprudence,

BASED ON THE DECISIONS IN THE ENGLISH COURTS.

By JOHN ALDERSON FOOTE,

Of Lincoln's Inn, Barrister-at-Law ; Chancellor's Legal Medallist and Senior Whewell Scholar of International Law Cambridge University, 1873 ; Senior Student in Jurisprudence and Roman Law, Inns of Court Examination Hilary Term, 1874.

"This work seems to us likely to prove of considerable use to all English lawyers who have to deal with questions of private international law. Since the publication of Mr. Westlake's valuable treatise, twenty years ago, the judicial decisions of English courts bearing upon different parts of this subject have greatly increased in number, and it is full time that these decisions should be examined, and that the conclusions to be deduced from them should be systematically set forth in a treatise. Moreover, Mr. Foote has done this well."—*Solicitors' Journal*.

"Mr. Foote has done his work very well, and the book will be useful to all who have to deal with the class of cases in which English law alone is not sufficient to settle the question."—*Saturday Review*, March 8, 1879.

"The author's object has been to reduce into order the mass of materials already accumulated in the shape of explanation and actual decision on the interesting matter of which he treats ; and to construct a framework of private international law, not from the *dicta* of jurists so much as from judicial decisions in English Courts which have superseded them. And it is here, in compiling and arranging in a concise form this valuable material, that Mr. Foote's wide range of knowledge and legal acumen bear such good fruit. As a guide and assistant to the student of international law, the whole treatise will be invaluable ; while a table of cases and a general index will enable him to find what he wants without trouble."—*Standard*.

"The recent decisions on points of international law (and there have been a large number since Westlake's publication) have been well stated. So far as we have observed, no case of any importance has been omitted, and the leading cases have been fully analyzed. The author does not hesitate to criticise the grounds of a decision when these appear to him to conflict with the proper rule of law. Most of his criticisms seem to us very just. . . . On the whole we can recommend Mr. Foote's treatise as a useful addition to our text-books, and we expect it will rapidly find its way into the hands of practising lawyers."—*The Journal of Jurisprudence and Scottish Law Magazine*.

"Mr. Foote has evidently borne closely in mind the needs of Students of Jurisprudence as well as those of the Practitioners. For both, the fact that his work is almost entirely one of Case-law, will commend it as one useful alike in Chambers and in Court."—*Law Magazine and Review*.

"Mr. Foote's book will be useful to the student. . . . One of the best points of Mr. Foote's book is the 'Continuous Summary,' which occupies about thirty pages, and is divided into four parts—Persons, Property, Acts, and Procedure. Mr. Foote remarks that these summaries are not in any way intended as an attempt at codification. However that may be, they are a digest which reflects high credit on the author's assiduity and capacity. They are 'meant merely to guide the student ;' but they will do much more than guide him. They will enable him to get such a grasp of the subject as will render the reading of the text easy and fruitful."—*Law Journal*.

"This book is well adapted to be used both as a text-book for students and a book of reference for practising barristers."—*Bar Examination Journal*.

"This is a book which supplies the want which has long been felt for a really good modern treatise on Private International Law adapted to the every-day requirements of the English Practitioner. The whole volume, although designed for the use of the practitioner, is so moderate in size—an octavo of 500 pages only—and the arrangement and development of the subject so well conceived and executed, that it will amply repay perusal by those whose immediate object may be not the actual decisions of a knotty point but the satisfactory disposal of an examination paper."—*Oxford and Cambridge Undergraduates' Journal*.

"Since the publication, some twenty years ago, of Mr. Westlake's Treatise, Mr. Foote's book is, in our opinion, the best work on private international law which has appeared in the English language. . . . The work is executed with much ability, and will doubtless be found of great value by all persons who have to consider questions on private international law."—*Athenæum*.

THE  
**Law Magazine and Review,**  
 AND  
 QUARTERLY DIGEST OF ALL REPORTED CASES.

Price FIVE SHILLINGS each Number.

No. CCXVIII. (Vol. 1, No. I. of the New QUARTERLY Series.) November, 1875.

No. CCXIX. (Vol. 1, 4th Series No. II.) February, 1876.

*N.B.—These two Numbers are out of print.*

No. CCXX. (Vol. 1, 4th Series No. III.) For May, 1876.

No. CCXXI. (Vol. 1, 4th Series No. IV.) For August, 1876.

No. CCXXII. (Vol. 2, 4th Series No. V.) For November, 1876.

No. CCXXIII. (Vol. 2, 4th Series No. VI.) For February, 1877.

No. CCXXIV. (Vol. 2, 4th Series No. VII.) For May, 1877.

No. CCXXV. (Vol. 2, 4th Series No. VIII.) For August, 1877.

No. CCXXVI. (Vol. 3, 4th Series No. IX.) For November, 1877.

No. CCXXVII. (Vol. 3, 4th Series No. X.) For February, 1878.

No. CCXXVIII. (Vol. 3, 4th Series No. XI.) For May, 1878.

No. CCXXIX. (Vol. 3, 4th Series No. XII.) For August, 1878.

No. CCXXX. (Vol. 4, 4th Series No. XIII.) For November, 1878.

No. CCXXXI. (Vol. 4, 4th Series No. XIV.) For February, 1879.

No. CCXXXII. (Vol. 4, 4th Series No. XV.) For May, 1879.

No. CCXXXIII. (Vol. 4, 4th Series No. XVI.) For August, 1879.

No. CCXXXIV. (Vol. 5, 4th Series No. XVII.) For November, 1879 :—

1. On Jurisprudence and the Amendment of the Law. By Sir Travers Twiss, Q.C., D.C.L.
2. Is Marriage a Contract? By Arthur Tilley, M.A., Barrister-at-Law.
3. A New Basis for a Code. By Thomas Thorneley, LL.B.
4. American Codification and the English Judicature Acts. By A. P. Sprague.
5. Copyright Law and the Report of the Royal Commission. By C. H. E. Carmichael, M.A.
6. Select Cases: Scottish. By Hugh Barclay, LL.D., Sheriff-Substitute, Perth.
7. Legal Obituary of the Quarter.
8. Reviews of New Books.
9. Quarterly Notes.
10. Quarterly Digest of all Reported Cases, with Table of Cases and Index of Subjects.

An Annual Subscription of 20s., paid in advance to the Publishers, will secure the receipt of the LAW MAGAZINE, free by post, within the United Kingdom, or for 24s. to the Colonies and Abroad.

Just published, in one vol., 8vo., 1878, cloth,

## A TREATISE ON HINDU LAW AND USAGE.

By JOHN D. MAYNE, of the Inner Temple, Barrister-at-Law, Author of "A Treatise on Damages," &c.

"A new work from the pen of so established an authority as Mr. Mayne cannot fail to be welcome to the legal profession. In his present volume the late Officiating Advocate-General at Madras has drawn upon the stores of his long experience in Southern India, and has produced a work of value alike to the practitioner at the Indian Bar, or at home, in appeal cases, and to the scientific jurist.

"To all who, whether as practitioners or administrators, or as students of the science of jurisprudence, desire a thoughtful and suggestive work of reference on Hindu Law and Usage, we heartily recommend the careful perusal of Mr. Mayne's valuable treatise."—*Law Magazine and Review*.

In 8vo., 1877, price 15s., cloth,

## A DIGEST OF HINDU LAW, AS ADMINISTERED IN THE COURTS OF THE MADRAS PRESIDENCY.

ARRANGED AND ANNOTATED

By H. S. CUNNINGHAM, M.A., Advocate-General, Madras.

In imperial 8vo., price 4s.,

## A DIGEST OF THE

ENGLISH AND INDIAN DECISIONS, Reported in the INDIAN JURIST, during the Year 1877.

By EDMUND FULLER GRIFFIN, of Lincoln's Inn, Barrister-at-Law.

\*\* *Annual Subscription to the INDIAN JURIST [24 Nos.] Forty-Eight Shillings, post free.*

## DUTCH LAW.

BUCHANAN (J.), Reports of Cases decided in the Supreme Court of the CAPE OF GOOD HOPE. 1868, 1869, 1870-73, and 74. Bound in Three Vols. Royal 8vo. 5l. 5s.

1875, Parts I to 4. 1l. 5s.

MENZIES' (W.), Reports of Cases decided in the Supreme Court of the CAPE OF GOOD HOPE. Vol. I., Vol. II., Vol. III. 7l. 7s.

BUCHANAN (J.), Index and Digest of Cases decided in the Supreme Court of the CAPE OF GOOD HOPE, reported by the late Hon. WILLIAM MENZIES. Compiled by JAMES BUCHANAN, Advocate of the Supreme Court. In One Vol., royal 8vo., 21s. cloth.

In 8vo., 1878, price 21s., cloth,

PRECEDENTS IN PLEADING: being Forms filed of Record in the Supreme Court of the Colony of the Cape of Good Hope. Collected and Arranged by JAMES BUCHANAN.

In Crown 8vo., price 31s. 6d., boards,

## THE INTRODUCTION TO DUTCH JURISPRUDENCE OF

HUGO GROTIUS, with Notes by Simon van Groenwegen van der Made, and References to Van der Keesel's Theses and Schorer's Notes. Translated by A. F. S. MAASDORP, B.A., of the Inner Temple, Barrister-at-Law.

In 12mo., price 10s. 6d., boards,

## SELECT THESES on the LAWS of HOLLAND and ZEELAND.

Being a Commentary of Hugo Grotius' Introduction to Dutch Jurisprudence, and intended to supply certain defects therein, and to determine some of the more celebrated Controversies on the Law of Holland. By DIONYSIUS GODEFRIDUS VAN DER KEESEL, Advocate, and Professor of the Civil and Modern Laws in the Universities of Leyden. Translated from the original Latin by C. A. LORENZ, of Lincoln's Inn, Barrister-at-Law. Second Edition, with a Biographical Notice of the Author by Professor J. DE WAL, of Leyden.

# THE Bar Examination Journal.

No. 23. Price 2s.

MICHAELMAS, 1879.

## CONTENTS:—

SUBJECTS OF EXAMINATION.

EXAMINATION PAPERS, WITH ANSWERS.

REAL AND PERSONAL PROPERTY.

EQUITY.

COMMON LAW.

ROMAN LAW.

LIST OF SUCCESSFUL CANDIDATES.

RECENT ACTS OF PARLIAMENT OF IMPORTANCE  
TO STUDENTS.

Edited by

A. D. TYSEN, D.C.L., M.A.,

Of the Inner Temple, Barrister-at-Law;

AND

W. D. EDWARDS, LL.B.,

Of Lincoln's Inn, Barrister-at-Law.

*\*\* It is intended in future to publish a Number of the Journal after each Examination.*

"The seventeenth number of this periodical takes a new and improved form. For the future a number, containing the questions and answers set at each examination for call at the Bar, will be issued immediately the examination is concluded. The answers given, in the journal before us, to the questions set at the examinations held last month,

are most accurate, and will be found of the greatest value to future candidates. In addition to the examination questions alluded to, other information most useful to law students is given. All students at the Inns of Court who do not possess a copy of the journal should order one at once."—*Oxford and Cambridge Undergraduates' Journal.*

In 8vo., 1878, price 5s., cloth,

## A SUMMARY OF JOINT STOCK COMPANIES' LAW.

BY

T. EUSTACE SMITH,

Student of the Inner Temple.

"The author of this handbook tells us that, when an articulated student reading for the final examination, he felt the want of such a work as that before us, wherein could be found the main principles of law relating to joint-stock companies. . . . Law students may well read it; for Mr. Smith has very wisely been at the pains of giving his authority for all his statements of the law or of practice, as applied to joint-stock company business usually transacted in solicitors' chambers. In fact, Mr. Smith has by his little book offered a fresh inducement to students to make themselves—at all events, to some extent—acquainted with company law as a separate branch of study."—*Law Times.*

"These pages give, in the words of the preface, 'as briefly and concisely as possible, a general view both of the principles and practice of the law affecting companies.' The work is excellently printed, and authorities are cited; but in no case is the very language of the statutes copied. The plan is good, and shows both grasp and neatness; and, both amongst students and laymen, Mr. Smith's book ought to meet a ready sale."—*Law Journal.*

"The book is one from which we have derived a large amount of valuable information, and we can heartily and conscientiously recommend it to our readers."—*Oxford and Cambridge Undergraduates' Journal.*

In 8vo., (December), 1878, price 12s., cloth,

## THE LAW OF NEGLIGENCE, SECOND EDITION.

By ROBERT CAMPBELL, of Lincoln's Inn, Barrister-at-Law, and Advocate  
of the Scotch Bar.

"A new edition has appeared of Mr. Campbell's excellent work on 'The Law of Negligence,' in which no pains have been spared in collecting cases, and the style of which is clear and easy."—*Saturday Review*, March 8, 1879.

"No less an authority than the late Mr. Justice Willes, in his Judgment in *Oppenheim v. White Lion Hotel Co.*, characterised Mr. Campbell's 'Law of Negligence' as a 'very good book'; and since very good books are by no means plentiful,

when compared with the numbers of indifferent ones which annually issue from the press, we think the profession will be thankful to the author of this new edition brought down to date. It is indeed an able and scholarly treatise on a somewhat difficult branch of law, in the treatment of which the author's knowledge of Roman and Scotch Jurisprudence has stood him in good stead. We confidently recommend it alike to the student and the practitioner."—*Law Magazine*.

### BIBLIOTHECA LEGUM.

In 12mo. (nearly 400 pages), price 2s., cloth,

## A CATALOGUE OF LAW BOOKS,

Including all the Reports in the various Courts of England, Scotland, and Ireland; with a Supplement to January, 1878. By HENRY G. STEVENS and ROBERT W. HAYNES, Law Publishers and Booksellers; Exporters of Law and Miscellaneous Literature; Foreign and Colonial Literary Agents, &c. &c.

In small 4to., price 2s., cloth, beautifully printed, with a large margin, for the special use of Librarians,

## A CATALOGUE OF THE REPORTS

IN THE VARIOUS COURTS OF THE

UNITED KINGDOM of GREAT BRITAIN and IRELAND.

ARRANGED BOTH IN ALPHABETICAL AND CHRONOLOGICAL ORDER.

By STEVENS & HAYNES, *Law Publishers*.

In royal 8vo., 1872, price 28s., cloth,

### AN INDEX TO

## TENTHOUSAND PRECEDENTS IN CONVEYANCING,

AND TO

### COMMON AND COMMERCIAL FORMS.

Arranged in Alphabetical order with Subdivisions of an Analytical Nature; together with an Appendix containing an Abstract of the Stamp Act, 1870, with a Schedule of Duties; the Regulations relative to, and the Stamp Duties payable on, Probates of Wills, Letters of Administration, Legacies, and Successions. By WALTER ARTHUR COPINGER, of the Middle Temple, Barrister-at-Law, Author of "The Law of Copyright in Works of Literature and Art."

In 8vo., Fourth Edition, 1878, price 6s., cloth, THE

## MARRIED WOMEN'S PROPERTY ACTS; THEIR RELATIONS TO THE DOCTRINE OF SEPARATE USE.

With Appendix of Statutes and Forms.

By the late J. R. GRIFFITH, B.A., Oxon, of Lincoln's Inn, Barrister-at-Law. *Fourth Edition*. By W. GREGORY WALKER, of Lincoln's Inn, Barrister-at-Law; Author of "A Manual of the Law of Partition," &c.

"The subject of this little treatise is one which is of every-day interest and practical importance, and the public and practitioner will find in this edition a brief but pithy statement of the laws, comprising the Acts themselves, and the Cases bearing upon their construction."—*Law Times*.

*In octavo, price 1s.*

## THE "SIX CLERKS IN CHANCERY;"

Their SUCCESSORS IN OFFICE, and the "HOUSES" they lived in. A Reminiscence. By THOMAS W. BRAITHWAITE, of the Record and Writ Clerks' Office.

"The removal of the Record and Writ Office to the new building, has suggested the publication of an interesting and opportune little piece of legal history."—*Solicitors' Journal*.

"Should reach the hands of everybody who take any interest in legal lore. . . ."—*Courier*.

"We can cordially recommend for general perusal Mr. Braithwaite's pamphlet, which merits perusal for the reason that it gives an admirable account of, perhaps, the most ancient office in the Civil Service of the Crown."—*Civil Service Gazette*.

*Second Edition in one volume of 1,000 pages, royal 8vo., price 50s., cloth,*

## PEMBERTON

ON

## JUDGMENTS AND ORDERS.

BEING

### A TREATISE UPON THE JUDGMENTS, DECREES, AND ORDERS

OF THE COURT OF APPEAL AND HIGH COURT OF JUSTICE,

Chiefly in reference to Actions assigned to the Chancery Division.

WITH COMPLETE FORMS OF ORDERS.

Second Edition, considerably enlarged.

BY LOFTUS LEIGH PEMBERTON,

*One of the Registrars of the Supreme Court of Judicature ;  
Author of "The Practice in Equity by way of Revivor and Supplement."*

### REVIEWS OF THE FIRST EDITION.

"This is a work with an unpretending title, which in reality contains much more than would naturally be inferred from its title page. . . . The work before us contains, not only a copious and well-selected assortment of precedents, taken in every instance from orders actually made (and with proper references to the reports in all instances of reported cases), but also a series of notes, in which the result of the leading cases is succinctly given in a highly-convenient, though somewhat fragmentary, form; by the light of which the practitioner will, in all ordinary cases, be easily able to adapt the opposite precedent to the general circumstances of his own case. We consider the book one of great merit and utility, and we confidently recommend it to the consideration of the Profession."—*Solicitors' Journal*.

"This volume, Mr. Pemberton tells us, is the result of labour commenced so long ago as 1869. It has had the benefit, therefore, of patient care, and patience and care having been backed up by extensive knowledge and keen discrimination, a work has been produced which, whilst it is not likely to bring its author any high reward, must permanently record his name in legal literature, and prove to the Profession and the Bench a very decided acquisition.

"Mr. Pemberton has digested the cases without expressing any opinion as to their soundness or applicability—not giving head notes, as too many text writers are fond of doing, without taking the trouble to consider whether the reporter has correctly epitomised the case, but stating in a few words the effect of each decision. This makes the work a compendium of case law on the various subjects comprehended in it. How comprehensive it is we find it impossible accurately to represent to our readers without setting out the table of contents. We have looked through it more than once; we have carefully examined the citations, and we have formed the very highest opinion of the plan of the work and its execution, and we feel that Mr. Pemberton has placed the entire profession under a lasting obligation."—*Law Times*.

"The operation of the Judicature Acts, with the new rules and orders, not only made an opportunity for, but even necessitated, a new publication of forms of judgments and orders. We may safely say that Mr. Loftus Leigh Pemberton's work, in our opinion, should take its rank among the most valuable publications that have been issued of late."—*Law Journal*.

In one volume, 8vo., 1877, price 16s., cloth,

# A CONCISE TREATISE ON THE STATUTE LAW OF THE LIMITATIONS OF ACTIONS.

With an Appendix of Statutes, Copious References to English, Irish, and American Cases, and to the French Code, and a Copious Index.

BY HENRY THOMAS BANNING, M.A.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"In this work Mr. Banning has grappled with one of the most perplexing branches of our statute law. The law, as laid down by the judicial decisions on the various Statutes of Limitations, is given in thirty-three short chapters under as many headings, and each chapter treats of a sub-division of one of the main branches of the subject; thus we have ten chapters devoted to real property. This arrangement entails a certain amount of repetition, but is not without its advantages, as the subject of each chapter is tolerably exhaustively treated of within the limits of a few pages. We think that in this respect the author has exercised a wise discretion. So far as we have tested the cases cited, the effect of the numerous decisions appears to be accurately given—indeed, the author has, as we are informed in the preface, 'so far as is consistent with due brevity, employed the *ipsissima verba* of the tribunal;' and the cases are brought down to a very recent date. . . . The substance of the book is satisfactory; and we may commend it both to students and practitioners."—*Solicitors' Journal*.

"Mr. Banning's, 'Concise Treatise' justifies its title. He brings into a convenient compass a general view of the law as to the limitation of actions as it exists under numerous statutes, and a digest of the principal reported cases relating to the subject which have arisen in the English and American courts."—*Saturday Review*.

"Mr. Banning has adhered to the plan of printing the Acts in an appendix, and making his book a running treatise on the case-law thereon. The cases have evidently been investigated with care and digested with clearness and intellectuality."—*Law Journal*.

In 8vo., 1876, price 8s., cloth,

# THE TRADE MARKS REGISTRATION ACT, 1875,

And the Rules thereunder; THE MERCHANDISE MARKS ACT, 1862, with an Introduction containing a SUMMARY OF THE LAW OF TRADE MARKS, together with practical Notes and Instructions, and a copious INDEX. By EDWARD MORTON DANIEL, of Lincoln's Inn, Barrister-at-Law.

"The last of the works on this subject, that by Mr. Daniel, appears to have been very carefully done. Mr. Daniel's book is a satisfactory and useful guide."—*The Engineer*.

"This treatise contains, within moderate compass, the whole of the law, as far as practically required, on the subject of trade marks. The publication is opportune, the subject being one which must nearly concern a considerable portion of the public, and it may be recommended to all who desire to take advantage of the protection afforded by registration under the new legislation. It is practical, and seems to be complete in every respect. The volume is well printed and neatly got up."—*Law Times*.

In 8vo., 1876, price 1s., sewed,

# AN ESSAY ON THE ABOLITION OF CAPITAL PUNISHMENT.

*Embracing more particularly an Enunciation and Analysis of the Principles of Law as applicable to Criminals of the Highest Degree of Guilt.*

BY WALTER ARTHUR COPINGER,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW;

Author of "The Law of Copyright in Works of Literature and Art," "Index to Precedents in Conveyancing," "On the Custody and Production of Title Deeds."

"We can recommend Mr. Copinger's book as containing the fullest collection we have seen of facts and quotations from eminent jurists, statistics, and general information bearing on the subject of capital punishment."—*Manchester Courier*.

In one volume, 8vo., 1877, price 15s., cloth,

# A TREATISE ON THE LAW OF REVIEW IN CRIMINAL CASES. WITH A COMMENTARY

ON THE SUMMARY PROCEDURE ACT, 1864, AND THE SUMMARY PROSECUTIONS APPEALS (SCOTLAND) ACT, 1875.

WITH AN APPENDIX

CONTAINING THE STATUTES; WITH NOTES AND CASES.

BY THE HON. HENRY J. MONCREIFF,

ADVOCATE.



In 8vo., 1877, price 6s., cloth,

# THE PARTITION ACTS, 1868 AND 1876.

A MANUAL OF THE

## LAW OF PARTITION AND OF SALE IN LIEU OF PARTITION.

*With the Decided Cases, and an Appendix containing Decrees and Orders.*

By W. GREGORY WALKER,

OF LINCOLN'S INN, BARRISTER-AT-LAW, B.A. AND LATE SCHOLAR OF EXETER COLLEGE, OXFORD.

"This is a very painstaking and praiseworthy little treatise. That such a work has now been published needs, in fact, only to be announced; for, meeting as it does an undoubted requirement, it is sure to secure a place in the library of every equity practitioner. . . . We are gratified to be able to add our assurance that the practitioner will find that his confidence has not been misplaced, and that Mr. Walker's manual, compact and inexpensive as it is, is equally exhaustive and valuable."—*Irish Law Times*.

"This handy-book contains the above-mentioned Partition Acts, with a manual of the law of partition,

and of sale in lieu of partition, and with the decided cases and an appendix containing decrees and orders. There are so many actions under the Partition Acts, that there is little doubt this small volume, containing as it does not merely references to all the reported cases, but the pith of the decisions extracted therefrom, will prove exceedingly useful. The appendix of decrees and orders, taken from the registrar's books kept in the Report Office, will be of great service to solicitors and counsel in settling minutes. Several of the judgments quoted will also help to keep those who have the conduct of partition suits in the right road."—*Law Journal*.

In 8vo., 1875, price 21s., cloth,

## A TREATISE ON THE LAW AND PRACTICE RELATING TO INFANTS.

By ARCHIBALD H. SIMPSON, M.A.,

*Of Lincoln's Inn, Esq., Barrister-at-Law, and Fellow of Christ's College, Cambridge.*

"Mr. Simpson's book comprises the whole of the law relating to infants, both as regards their persons and their property, and we have not observed any very important omissions. The author has evidently expended much trouble and care upon his work, and has brought together, in a concise and convenient form, the law upon the subject down to the present time."—*Solicitors' Journal*.

"Its law is unimpeachable. We have detected no errors, and whilst the work might have been done more scientifically, it is, beyond all question, a compendium of sound legal principles."—*Law Times*.

"Mr. Simpson has arranged the whole of the Law relating to Infants with much fullness of detail, and yet in comparatively little space. The result is due mainly to the businesslike condensation of his style. Fullness, however, has by no means been sacrificed to brevity, and, so far as we have been

able to test it, the work omits no point of any importance, from the earliest cases to the last. In the essential qualities of clearness, completeness, and orderly arrangement it leaves nothing to be desired.

"Lawyers in doubt on any point of law or practice will find the information they require, if it can be found at all, in Mr. Simpson's book, and a writer of whom this can be said may congratulate himself on having achieved a considerable success."—*Law Magazine*, February, 1876.

"The reputation of 'Simpson on Infants' is now too perfectly established to need any encomiums on our part; and we can only say that, as the result of our own experience, we have invariably found this work an exhaustive and trustworthy repository of information on every question connected with the law and practice relating to its subject."—*Irish Law Times*, July 7, 1877.

In 8vo., 1875, price 6s., cloth,

## THE LAW CONCERNING THE REGISTRATION OF BIRTHS AND DEATHS IN ENGLAND AND WALES, AND AT SEA.

Being the whole Statute Law upon the subject; together with a list of Registration Fees and Charges. Edited with Copious Explanatory Notes and References, and an Elaborate Index. By ARTHUR JOHN FLAXMAN, of the Middle Temple, Barrister-at-Law.

"Mr. Flaxman's unpretentious but admirable little book makes the duties of all parties under the Act abundantly clear. . . . Lawyers will find the book not only handy, but also instructive and suggestive. To registrars, and all persons engaged in the execution of the law, the book will be invaluable. The index occupies thirty-five pages, and is so full that information on a minute point can be obtained without trouble. It is an index that must have cost the author much thought and time. The statements of what is to be done, who may do it, and what must not be done, are so clear that it is well nigh impossible for any one who consults the book to err. Those who use 'Flaxman's Regis-

tration of Births and Deaths' will admit that our laudatory criticism is thoroughly merited."—*Law Journal*.

"Mr. Arthur John Flaxman, barrister-at-law, of the Middle Temple, has published a small work on 'The Law Concerning the Registration of Births and Deaths in England and Wales, and at Sea.' Mr. Flaxman has pursued the only possible plan, giving the statutes and references to cases. The remarkable feature is the index, which fills no less than 45 out of a total of 112 pages. The index alone would be extremely useful, and is worth the money asked for the work."—*Law Times*.

## THE LAW OF EXTRADITION.

Second Edition, in 8vo., 1874, price 18s., cloth,

## A TREATISE UPON

## THE LAW OF EXTRADITION.

WITH THE

CONVENTIONS UPON THE SUBJECT EXISTING BETWEEN  
ENGLAND AND FOREIGN NATIONS,

AND

## THE CASES DECIDED THEREON.

By EDWARD CLARKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW, AND LATE TANCRED STUDENT.

"Mr. Clarke's accurate and sensible book is the best authority to which the English reader can turn upon the subject of Extradition."—*Saturday Review*.

"The opinion we expressed of the merits of this work when it first appeared has been fully justified by the reputation it has gained. This new edition, embodying and explaining the recent legislation on extradition, is likely to sustain that reputation. . . . There are other points we had marked for comment, but we must content ourselves with heartily commending this new edition to the attention of the profession. It is seldom we come across a book possessing so much interest to the general reader and at the same time furnishing so useful a guide to the lawyer."—*Solicitors' Journal*.

"The appearance of a second edition of this treatise does not surprise us. It is a useful book, well arranged and well written. A student who wants to learn the principles and practice of the law of extradition will be greatly helped by Mr. Clarke. Lawyers who have extradition business will find this volume an excellent book of reference. Magistrates who have to administer the extradition law will be greatly assisted by a careful perusal of 'Clarke upon Extradition.' This may be called a warm commendation, but those who have read the book will not say it is unmerited. We have so often to expose the false pretenders to legal authorship that it is a pleasure to meet with a volume that is the useful and unpretending result of honest work. Besides the Appendix, which contains the extradition conventions of this country since 1843, we have eight chapters. The first is 'Upon the Duty of Extradition;' the second on the 'Early Treaties and Cases;' the others on the law in the United States, Canada, England, and France, and the practice in those countries."—*Law Journal*.

"One of the most interesting and valuable contributions to legal literature which it has been our province to notice for a long time, is 'Clarke's Treatise on the Law of Extradition.' . . . Mr. Clarke's work comprises chapters upon the Duty of Extradition; Early Treaties and Cases; History of the Law in the United States, in Canada, in England, in France, &c., with an Appendix containing the Conventions existing between England and Foreign Nations, and the Cases decided thereon. . . . The work is ably prepared throughout, and should form a part of the library of every lawyer interested in great Constitutional or International Questions."—*Albany Law Journal*.

THE TIMES of September 7, 1874, in a long article upon "Extradition Treaties," makes considerable use of this work, and writes of it as "*Mr. Clarke's useful Work on Extradition.*"

In 8vo., 1876, price 8s., cloth,

THE PRACTICE AND PROCEDURE IN APPEALS  
FROM INDIA TO THE PRIVY COUNCIL.By E. B. MICHELL and R. B. MICHELL, *Barristers-at-Law*.

"A useful manual arranging the practice in convenient order, and giving the rules in force in several Courts. It will be a decided acquisition to those engaged in Appeals from India."—*Law Times*.

## PRACTICE OF CONVEYANCING.

In 8vo., 1878, price 2s. 6d., cloth,

## TABLES OF STAMP DUTIES

FROM 1815 TO THE PRESENT TIME.

BY

WALTER ARTHUR COPINGER,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW;

*Author of "The Law of Copyright in Works of Literature and Art," "Index to Precedents in Conveyancing," "Title Deeds," &c.*

"Conveyancers owe Mr. Copinger a debt of gratitude for his valuable Index to Precedents in Conveyancing; and we think the little book now before us will add to their obligations. Mr. Copinger gives, first of all, an abstract of the Stamp Act, 1870, with the special regulations affecting conveyances, mortgages, and settlements in full. He then presents in a tabular form the *ad valorem* stamp duties on conveyances, mortgages, and settlements, payable in England from the 1st of

September, 1815, to the 10th of October, 1850, and then tables of *ad valorem* duties payable on the three classes of instruments since the last-mentioned date, and at the present time; arranged very clearly in columns. We cannot pretend to have checked the figures, but those we have looked at are correct; and we think this little book ought to find its way into a good many chambers and offices."—*Solicitors' Journal*.

"This book, or at least one containing the same amount of valuable and well-arranged information, should find a place in every Solicitor's office. It is of especial value when examining the abstract of a large number of old title deeds."—*LAW TIMES*.

"Mr. W. A. Copinger, so well known for his work on Title Deeds, was eminently calculated to assist the practitioner in unravelling the perplexities often surrounding the question of the due Stamping of Deeds, set out in Abstracts laid before Counsel.

His *Tables of Stamp Duties*, from 1815 to 1878, have already been tested in Chambers, and being now published, will materially lighten the labours of the profession in a tedious department, yet one requiring great care."—*Law Magazine and Review*.

In one volume, 8vo., 1875, price 14s., cloth,

## Title Deeds:

THEIR CUSTODY, INSPECTION, AND PRODUCTION,

At Law, in Equity and in Matters of Conveyancing,

Including Covenants for the Production of Deeds and Attested Copies; with an Appendix of Precedents, the Vendor and Purchaser Act, 1874, &c., &c., &c. By WALTER ARTHUR COPINGER, of the Middle Temple, Barrister-at-Law; Author of "The Law of Copyright" and "Index to Precedents in Conveyancing."

"In dealing with 'documentary evidence at law and in equity and in matters of conveyancing, including covenants for the production of deeds and attested copies,' Mr. Copinger has shown discrimination, for it is a branch of the general subject of evidence which is very susceptible of independent treatment. We are glad, therefore, to be able to approve both of the design and the manner in which it has been executed.

"The literary execution of the work is good enough to invite quotation, but the volume is not

large, and we content ourselves with recommending it to the profession."—*Law Times*.

"A really good treatise on this subject must be essential to the lawyer; and this is what we have here. Mr. Copinger has supplied a much-felt want by the compilation of this volume. We have not space to go into the details of the book; it appears well arranged, clearly written, and fully elaborated. With these few remarks we recommend this volume to our readers."—*Law Journal*.

In one volume, 8vo., 1870, price cloth,

## THE LAW OF COPYRIGHT.

In Works of Literature and Art; including that of the Drama, Music, Engraving, Sculpture, Painting, Photography, and Ornamental and Useful Designs; together with International and Foreign Copyright, with the Statutes relating thereto, and References to the English and American Decisions. By WALTER ARTHUR COPINGER, of the Middle Temple, Barrister-at-Law.

"A book that is certainly the most complete treatise upon the complex subject of copyright which has ever been published in England."—*Athenaeum*.  
 "A work much needed, and which he has done exceedingly well."—*American Law Review*.

"The book is a thoroughly good one."—*The Bookseller*.

"We refer our readers to this capital book on Copyright."—*The Publishers' Circular*.

*Second Edition in preparation.*

# A MAGISTERIAL & POLICE GUIDE:

Being the Statute Law,

INCLUDING THE SESSION OF 1879,

WITH NOTES AND REFERENCES TO THE DECIDED CASES,

RELATING TO THE

PROCEDURE, JURISDICTION, AND DUTIES OF MAGISTRATES  
AND POLICE AUTHORITIES,

IN THE METROPOLIS AND IN THE COUNTRY.

With an Introduction showing the General Procedure before Magistrates both in Indictable and Summary Matters, as altered by the Summary Jurisdiction Act, 1879 together with the Rules under the said Act.

BY HENRY C. GREENWOOD,

*Stipendiary Magistrate for the District of the Staffordshire Potteries;*

AND

TEMPLE C. MARTIN,

*Chief Clerk of the Lambeth Police Court.*

## NOTICES OF THE FIRST EDITION.

"For the form of the work we have nothing but commendation. We may say we have here our ideal law book. It may be said to omit nothing which it ought to contain."—*Law Times*.

"This handsome volume aims at presenting a comprehensive magisterial handbook for the whole of England. The mode of arrangement seems to us excellent, and is well carried out."—*Solicitors' Journal*.

"As to the care with which the work has been executed, a somewhat minute examination of three or four of the divisions enables us to speak on the whole favourably."—*Solicitors' Journal*.

"Great pains have evidently been taken in every part of the work to ensure correctness; and this quality, together with that of its great comprehensiveness, can scarce fail to render this guide to procedure before magisterial and police authorities eminently acceptable to the many classes of persons to whom full and accurate information on the subject it deals with is often of the utmost importance."—*Morning Post*.

"The *Magisterial and Police Guide*, by Mr. Henry Greenwood and Mr. Temple C. Martin, is a model work in its conciseness, and, so far as we have been able to test it, in completeness and accuracy. It ought to be in the hands of all who, as magistrates or otherwise, have authority in matters of police."—*Daily News*.

"Both to justices and practitioners desirous of obtaining a book of reference giving the present practice of the courts, this book will be found of great service—nay, almost invaluable."—*Liverpool Mercury*.

"Mr. Greenwood, stipendiary magistrate in the Staffordshire Potteries district, and Mr. Martin, of the Southwark Police Court, have produced a portly magisterial handbook applicable to the whole of England. It contains all the statute law relating to the procedure, jurisdiction, and duties of magistrates and police authorities, with notes and references to recent decisions, and appears to be put together, as might be expected from the professional experience of the authors, in a thorough and business-like manner."—*Saturday Review*.

"This work is eminently practical, and supplies a real want. It plainly and concisely states the law on all points upon which Magistrates are called upon to adjudicate, systematically arranged, so as to be easy of reference. It ought to find a place on every Justice's table, and we cannot but think that its usefulness will speedily ensure for it as large a sale as its merits deserve."—*Midland Counties Herald*.

"The exceedingly arduous task of collecting together all the enactments on the subject has been ably and efficiently performed, and the arrangement is so methodical and precise that one is able to lay a finger on a Section of an Act almost in a moment. It is wonderful what a mass of information is comprised in so comparatively small a space. We have much pleasure in recommending the volume not only to our professional but also to our general readers; nothing can be more useful to the public than an acquaintance with the outlines of magisterial jurisdiction and procedure."—*Sheffield Post*.

Now ready, in One Vol., 8vo., 1878, price 12s., cloth.

# A COMPENDIUM of ROMAN LAW,

FOUNDED ON THE INSTITUTES OF JUSTINIAN:

TOGETHER WITH

## EXAMINATION QUESTIONS

SET IN THE UNIVERSITY AND BAR EXAMINATIONS  
(WITH SOLUTIONS),

And Definitions of Leading Terms in the Words of the  
Principal Authorities.

By GORDON CAMPBELL,

Of the Inner Temple, M.A., late Scholar of Exeter College, Oxford; M.A. Trinity College, Cambridge; Author of "An Analysis of Austin's Jurisprudence, or the Philosophy of Positive Law."

"Mr. Campbell, in producing a compendium of Roman law, has gone to the best English works already existing on the subject, and has made extensive use of the materials found in them. The volume is especially intended for the use of students who have to pass an examination in Roman law, and its arrangement with a view to this end appears very good. The existence of text-books such as this should do much to prevent the evil system of cramming."—*Saturday Review*.

"This compendium is, in the words of the preface, intended for those students at the Universities and Inns of Courts who have to pass an examination in Roman Law.' In its preparation the author has made use of the works to which those students are generally required to give their attention, such as Austin's Justinian, Poste's Gaius, Maine's Ancient Law, Austin's Jurisprudence, and similar publications. Practically this compendium is an analysis

in English of Roman law, interspersed with such comments taken from the above authors and editors as serve to render clearer and to rectify, when necessary, the main principles and definitions which are founded in that law. Thus in the opening page we have Ulpian's definition of justice and jurisprudence, followed by Austin's objection to those definitions, namely that they would embrace not only law but positive morality and the test to which both are to be referred. Again, the definition of an action given in Justinian is contrasted with a quotation from the student's Austin; and the same plan is adopted throughout the Compendium. This plan will undoubtedly be of service to students of the civil law. There is a very useful appendix containing questions taken, for the most part, from papers set at examinations at the Universities and in the Bar examinations, and some definitions and descriptions of leading terms."—*Law Times*.

## MINING LAWS OF THE UNITED STATES.

In 8vo., 1877, price 7s. 6d., cloth,

# *Titles to Mines in the United States,*

WITH THE

Statutes and References to the Decisions of the Courts  
relating thereto.

By W. A. HARRIS, B.A., OXON.,

Of Lincoln's Inn, Barrister-at-Law, and of the American Bar.

"We have merely sketched the contents of this interesting volume, and though the author apologises in the preface for its incompleteness, we are bound to admit that we cannot suggest any point on which information on this subject could be desired that it has been withheld. Mr. Harris may be credited with having done his best to simplify the American mining laws, and in so doing has earned the thanks of all persons interested in the subject."—*The Mining World*.

"It is carefully and thoroughly written throughout, and the information given, whilst it is brief and free from technicalities, will prove ample for the professional man who may be called upon to transact legal business connected with American mines, and will be found useful and interesting to the general reader."—*The Mining Journal*.

"The author is an English barrister, who is also

a member of the American Bar, and he has had much experience in American and Anglo-American Mining Law.

"He has now collated such of the mining laws of the United States as are likely to be of importance to English mining adventurers who invest in American mines.

"The information is very comprehensive, and seems to embrace all things pertinent to the subject. The case of the 'Emma' Mine has drawn much attention to the American mining law, and Mr. Harris' work will be found an excellent exponent."—*London Iron Trade Exchange*.

"This is a most valuable work—indeed, we might say indispensable—for legal gentlemen and investors in American land and mineral property, and the author is well qualified to give the information and advice needed."—*The Colliery Guardian*.

# INDEX to the NAMES of AUTHORS and EDITORS of WORKS enumerated in this Catalogue.

ARGLES (N.), page 32.  
BALDWIN (E. T.), 15.  
BANNING (H. T.), 42.  
BARTON (G. B.), 18.  
BELLEWE (R.), 34.  
BRAITHWAITE (T. W.), 41.  
BRICE (SEWARD), 8, 16.  
BROOKE (SIR R.), 35.  
BROWN (ARCHIBALD), 20, 22, 26.  
BROWNE (J. H. BALFOUR), 19.  
BUCHANAN, (J.), 38.  
BUCKLEY (H. B.), 17.  
BUCKNILL (T. T.), 34, 35.  
BUSHBY (H. J.), 33.  
CAMPBELL (GORDON), 47.  
CAMPBELL (ROBERT), 40.  
CLARKE (EDWARD), 44.  
COGLAN (W. M.), 28.  
COOKE (SIR G.), 35.  
COOKE (HUGH), 10.  
COPINGER (W. A.), 40, 42, 45.  
CORNER (R. J.), 10.  
CUNNINGHAM (H. S.), 38.  
CUNNINGHAM (JOHN), 7.  
CUNNINGHAM (T.), 34.  
DANIEL (E. M.), 42.  
DEANE (H. C.), 23.  
DE WAL (J.), 38.  
EDWARDS (W. D.), 39.  
EVANS (G.), 32.  
FINLASON (W. F.), 32.  
FLAXMAN (A. J.), 43.  
FOOTE (J. ALDERSON), 36.  
FORSYTH (W.), 12.  
GIBBS (F. W.), 10.  
GODEFROI (H.), 14.  
GOODEVE (L. A.), 29.  
GREENWOOD (H. C.), 46.  
GRIFFIN (E. F.), 38.  
GRIFFITH (J. R.), 40.  
GRIFFITH (W. DOWNES), 6.  
GROTIUS (HUGO), 38.  
HALL (R. G.), 30.  
HANSON (A.), 10.  
HARDCASTLE (H.), 9, 33.  
HARRIS (SEYMOUR F.), 20, 27.  
HARRIS (W. A.), 47.  
HARWOOD (R. G.), 10.  
HAZLITT (W.), 9.

HIGGINS (C.), page 30.  
HOUSTON (J.), 32.  
INDERMAUR (JOHN), 24, 25.  
JONES (E.), 14.  
JOYCE (W.), 11.  
KAY (JOSEPH), 17.  
KELYNG (SIR J.), 35.  
KELYNGE (W.), 35.  
LLOYD (EYRE), 13, 15.  
LOCKE (J.), 32.  
LORENZ (C. A.), 38.  
LOVELAND (R. L.), 6, 10, 30, 34, 35.  
MAASDORP (A. F. S.), 38.  
MARCH (JOHN), 35.  
MARSH (THOMAS), 21.  
MARTIN (TEMPLE C.), 46.  
MATTINSON (M. W.), 7.  
MAY (H. W.), 29.  
MAYNE (JOHN D.), 31, 38.  
MENZIES (W.), 38.  
MICHELL (E. B.), 44.  
MONCREIFF (H. J.), 42.  
MORIARTY, 14.  
O'MALLEY (E. L.), 33.  
PEMBERTON (L. L.), 32, 41.  
REILLY (F. S.), 29.  
RINGWOOD (R.), 15.  
ROBERTSON (A.), 41.  
ROBINSON (W. G.), 32.  
ROCHE (H. P.), 9.  
SAVIGNY (F. C. VON), 20.  
SHORT (F. H.), 8, 10.  
SHORTT (JOHN), 14.  
SHOWER (SIR B.), 34.  
SIMPSON (A. H.), 43.  
SMETHURST (J. M.), 18.  
SMITH (EUSTACE), 23, 39.  
SMITH (LUMLEY), 31.  
SNELL (E. H. T.), 22.  
TARRANT, (H. J.), 14.  
TASWELL-LANGMEAD, 21.  
THOMAS (ERNEST C.), 28.  
TYSSSEN (A. D.), 39.  
VAN DER KEESEL (D. G.), 38.  
WALKER (W. G.), 36, 43.  
WHITEFORD (F. M.), 20.



STEVENS AND HAYNES' LAW PUBLICATIONS.

*In 8vo, price 20s. cloth,*

**A TREATISE ON THE RULES WHICH GOVERN THE CONSTRUCTION AND EFFECT OF STATUTORY LAW.** With an Appendix of Certain Words and Expressions used in Statutes which have been judicially or statutely construed. By HENRY HARDCASTLE, of the Inner Temple, Barrister-at-Law.

*In One Volume, 8vo, 1878, price 12s. cloth,*

**A COMPENDIUM OF ROMAN LAW: FOUNDED ON THE INSTITUTES OF JUSTINIAN.** Together with Examination Questions Set in the University and Bar Examinations (with Solutions), and Definitions of Leading Terms in the Words of the Principal Authorities. By GORDON CAMPBELL, of the Inner Temple, M.A., late Scholar of Exeter College, Oxford; M.A. Trinity College, Cambridge; Author of "An Analysis of Austin's Jurisprudence."

*In 8vo, 1878, Fourth Edition, price 6s. cloth,*

**THE MARRIED WOMEN'S PROPERTY ACTS: Their Relations to the Doctrine of Separate Use.** With Appendix of Statutes and Forms. By the late J. R. GRIFFITH, of Lincoln's Inn, Barrister-at-Law. *Fourth Edition* by W. GREGORY WALKER, of Lincoln's Inn, Barrister-at-Law, Author of "A Manual of the Law of Partition."

*In One Volume, 8vo, price 18s. cloth,*

**PRINCIPLES OF CONVEYANCING.** An Elementary Work for the use of Students. By HENRY C. DEANE, of Lincoln's Inn, Barrister-at-Law, sometime Lecturer to the Incorporated Law Society of the United Kingdom.

*In 8vo, Second Edition, price 18s. cloth,*

**A TREATISE UPON THE LAW OF EXTRADITION,** With the Conventions upon the subject existing between England and Foreign Nations, and the Cases decided thereon. By EDWARD CLARKE, of Lincoln's Inn, Barrister-at-Law, and late Tancered Student.

*Second Edition in the Press.*

**A MAGISTERIAL AND POLICE GUIDE: Being the Statute Law, including the Session of 1879, with Notes and References to the most recently decided Cases, relating to the Procedure, Jurisdiction, and Duties of Magistrates and Police Authorities in the Metropolis and in the Country.** With an Introduction, showing the General Procedure before Magistrates both in Indictable and Summary Matters as altered by the Summary Jurisdiction Act 1879, and a Copious Index to the Whole Work. By HENRY C. GREENWOOD, Stipendiary Magistrate for the District of the Staffordshire Potteries, and TEMPLE C. MARTIN, of the Lambeth Police Court.

"We have here our ideal law book. It may be said to omit nothing which it ought to contain."—*Law Times.*

*In One Volume, 8vo, price 25s. cloth,*

**A PRACTICAL TREATISE ON THE LAW RELATING TO THE RATING OF RAILWAY, GAS, DOCK, HARBOUR, TRAMWAY, BRIDGE, FERN, AND OTHER CORPORATIONS, TO THE RELIEF OF THE POOR.** By J. H. BALFOUR BROWN, of the Middle Temple, Barrister-at-Law, Author of "The Law of Usages and Customs," "The Law of Carriers," &c.

*In 8vo, price 12s. cloth,*

**THE LAW OF FIXTURES.** Third Edition, including the Law under the AGRICULTURAL HOLDINGS ACT, 1875, incorporating the principal American Decisions, and generally bringing the law down to the present time. By ARCHIBALD BROWN, M.A. Edin. and Oxon., and B.C.L. Oxon., of the Middle Temple, Barrister-at-Law.

*In 8vo, price 10s. cloth,*

**THE ELEMENTS OF ROMAN LAW SUMMARISED.** Primarily designed for the use of Students preparing for Examination at Oxford, Cambridge, and the Inns of Court. By SEYMOUR F. HARRIS, B.C.L., M.A., of Worcester College, Oxford, and the Inner Temple, Barrister-at-Law.





